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S. HRG. 101-467

NOMINATIONS OF HON. KENNETH B. KRAMER AND JOHN J. FARLEY III

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE NOMINATIONS OF HON. KENNETH B. KRAMER AND JOHN J. FARLEY III, TO BE ASSOCIATE JUDGES OF THE UNITED STATES COURT OF VETERANS APPEALS

SEPTEMBER 13, 1989

Printed for the use of the Committee on Veterans' Affairs

U.S. GOVERNMENT PRINTING OFFICE

25-740 WASHINGTON : 1990

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S761-6

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NOMINATIONS OF HON. KENNETH B. KRAMER AND JOHN J. FARLEY III, TO BE ASSOCIATE JUDGES OF THE U.S. COURT OF VETERANS APPEALS

WEDNESDAY, SEPTEMBER 13, 1989

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SR-418, Russell Senate Office Building, Hon. Alan Cranston (chairman of the committee) presiding.

Present: Senators Cranston, Murkowski, and Thurmond.

Also present: Senators Armstrong, Sarbanes, and Wirth.

Chairman CRANSTON. The committee will come to order. Welcome to this meeting to consider the nominations of Kenneth B. Kramer and John J. Farley III, to be Associate Judges of the United States Court of Veterans Appeals.

Ken and Jack, I offer a warm welcome to each of you and I congratulate you on your nominations.

I have an opening statement but before making it I will yield to Senator Paul Sarbanes, who is here to make an introduction.

STATEMENT OF HON. PAUL S. SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Mr. Chairman, I very much appreciate that courtesy. I have another hearing which I have to chair very shortly.

Chairman CRANSTON. I suspected that.

Senator SARBANES. Mr. Chairman, I have to say that I am delighted to appear before you this morning and to have the opportunity to recommend, without any qualification, a nominee submitted to us for our advice and consent responsibility, Jack Farley of Bowie, MD, to serve on the newly-created U.S. Court of Veterans Appeals. He will bring to the court an outstanding record of professional and public service.

Jack Farley is a graduate of Holy Cross College. He then received an MBA from the Columbia University Graduate School of Business. He then went to Vietnam and is a highly-decorated veteran of that war. He served as a captain in the artillery. His decorations include the Bronze Star Medal with V device and three oak leaf clusters; Purple Heart Medal with oak leaf cluster; and the Army Commendation Medal. He was retired from the Army be-

cause of total disability resulting from wounds received in Vietnam.

He went through a period of recuperation here in Walter Reed Hospital, and under the VA's Vocational Rehabilitation Program he attended Hofstra University School of Law and graduated first in his class and was the editor of the Law Review.

He then came to work for the Justice Department as an Honor Law Graduate, and he was immediately assigned to the Veterans' Administration. He has had a very distinguished career with the Department of Justice, progressively taking on more challenging positions from year to year. He initially served as a trial attorney in the Tort Section of the Civil Division. He eventually became Assistant Director, and subsequently Director, of the Civil Division's Torts Branch. He currently directs a staff of 34, including 20 trial attorneys.

He has been honored for his service in the Federal Government, having received the Senior Executive Service's Special Achievement Award in 1984 and 1988; the first Civil Division Special Award for Superior Performance, and the Department of Justice Special Achievement Award. In fact, he serves on the Executive Committee of the Senior Executive Association, and his alma mater, Hofstra University School of Law, honored him in 1986 with the Distinguished Alumni Medal, where he was the commencement speaker.

I have to tell you that he is enormously respected in his local community in Maryland, in Bowie, and in Prince Georges County.

This is a quality appointment. I know it's for 15 years; that's a long time. I think that the Nation will be well-served by a person of the integrity and the ability and the commitment of Jack Farley. I commend him to you and your colleagues on the Committee on Veterans' Affairs without reservation, and I am delighted to be here this morning to make this introduction.

Chairman CRANSTON. Thank you very much, Paul. We appreciate very much, and I'm sure that Jack does, that very warm recommendation.

It is now my pleasure to call upon Senator Tim Wirth, who is also here to make an introduction.

STATEMENT OF HON. TIMOTHY E. WIRTH, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator WIRTH. Thank you very much, Mr. Chairman. I am very pleased to be here to introduce Ken Kramer to you as an Associate Judge on the Court of Veterans Appeals.

Ken Kramer and I have known each other for a long time, sometimes as colleagues, sometimes as friendly competitors. Ken is a graduate of Harvard Law School, as you know, and after distinguished service in the U.S. Army he served in the State legislature, then served for 8 years in the U.S. House of Representatives, with particular attention to the Armed Services Committee, where he made very significant contributions to Colorado and the country. He was then, I can say, a very persistent candidate for the U.S. Senate, a persistence that all of us had come to respect and admire.

After the 1986 Senate race he went to work for the Reagan administration as Assistant Secretary of the Army and was nominated in May to be an Associate Judge on the Court of Veterans Appeals.

I hope that the committee will act expeditiously on Ken Kramer's candidacy to be a judge on the Court of Veterans Appeals. I am delighted that Ken has agreed to take on this assignment, and we greatly appreciate your expeditious handling of this matter.

I want to thank you very much, Mr. Chairman. I note that I was joined here by our senior colleague from the State of Colorado, Senator William Armstrong.

[The prepared statement of Senator Wirth appears on p. 77.]

Chairman CRANSTON. Thank you very much, Tim. I appreciate that statement.

I welcome you, Senator Armstrong, to this hearing. This is a very bipartisan affair this morning. We are delighted to have you here.

STATEMENT OF HON. WILLIAM L. ARMSTRONG, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ARMSTRONG. Mr. Chairman, thank you. I am also honored to join in introducing and saying a word on behalf of my friend and colleague, Ken Kramer. It especially gave me a great deal of pleasure and satisfaction to enter the room just as my colleague, Tim Wirth, was speaking because Tim has encountered Ken in a setting that I have not. Ken was my successor; when I left the House of Representatives, Ken became the Congressman from that district. But Tim has come across Ken out on the campaign trail, and for him to make the kind of gracious statement that he has made today is a great compliment not only to Ken, but it's a great compliment to Senator Wirth, and I thank him for it.

Mr. Chairman, I have prepared and would like to submit for the record a fairly extensive statement of Ken's biographical background and pedigree and experience. Senator Wirth has already pointed out that Ken has had a distinguished career in law. He is a graduate of a fine law school. He was a law officer for the Army, a member of the Judge Advocate General's Corps, worked on a number of cases that have relevance and significance to the work that he has now been nominated to undertake. He was a member of the House Armed Services Committee, so he brings not only professional expertise but longstanding experience and devotion to national defense. I am sure that he will be a very fine judge of this new court.

So I echo what Senator Wirth has said. I hope the committee will act promptly and favorably on this nomination.

[The prepared statement of Senator Armstrong appears on p. 18.]

Chairman CRANSTON. Thank you very much, Bill. We appreciate that statement and we appreciate your presence this morning.

I will now proceed with my statement.

OPENING STATEMENT OF CHAIRMAN CRANSTON

Chairman CRANSTON. Jack, I am pleased to note that you are accompanied by your wife, Kathleen, your daughters, Maura and Caitlin, and your sons, Thomas and Brendan. A special warm wel-

come to all of them. I know they are terribly proud of you, as they well should be.

I would also like to welcome back Judge Frank Nebeker, who was confirmed by the Senate in May to be the first Chief Judge of the new Court of Veterans Appeals. Congratulations again to you, Frank.

Today's hearing brings us another step closer to the realization of a dream that began in the Senate over 14 years ago, to provide for judicial review of VA decisions denying claims for benefits. The two nominations before the committee today, if confirmed—and I assume they will be—will allow the court to begin operating and fulfill the long-awaited function of serving as a source of justice for veterans.

The sustained effort in the Senate over the past 14 years to provide judicial review of VA decisions denying benefits claims has involved a tremendous amount of work by this committee, so the new court is of special significance to us. All of us here, and surely the many veterans who have contacted the committee and VA for information about the new court, share the common desire to see it functioning as soon as possible.

It was just 1 week ago, on September 6, that the nomination of Mr. Farley was referred to the committee, and we appreciate the speed with which he completed the committee's questionnaires and responded to the prehearing questions which were submitted. Former Representative Kramer, whose nomination was referred to the committee on May 9, returned his responses to the prehearing questions on August 14, during the last Senate recess. Because the law provides for the court to begin operations upon the confirmation of three judges, we wanted to move forward rapidly with this hearing on the two current nominees.

Regarding the two nominees, many aspects of their respective backgrounds are notable in assessing their qualifications to be Associate Judges of the new Court of Veterans Appeals. The Senators who made the introductions this morning have already gone over some of that biographical material, but I would like to go over it once again for the purposes of this committee.

Kenneth Kramer served in Congress as the Representative of Colorado's Fifth Congressional District from 1979 to 1986. During that time he spoke articulately and effectively on behalf of our Nation's veterans and supported legislation to assist them. His time as a U.S. Congressman, as well as his 5 years as a Colorado State representative, have given him ample opportunity to utilize his legal skills within the legislative process.

Currently he is serving as the Assistant Secretary of the Army for Financial Management. His responsibilities as chief financial officer of the U.S. Army include the formulation and execution of the Army's $80 billion budget and serving as liaison with Senate and House Defense Appropriations Subcommittees, roles which have also drawn on his previous legislative experience. Of particular pertinence is the responsibility he carries out in deciding upon the settlement of tort claims against the Army.

Mr. Kramer has also combined his military service with his interest in the rights of veterans. While a captain in the U.S. Army Judge Advocate General's Corps, he gained substantial experience

with the broad range of legal problems to which soldiers and their families are exposed.

Mr. Farley's qualifications are in a different arena but no less impressive. Since he first joined the Department of Justice in 1973, he has gained wide experience and expertise while representing the United States in various tort cases. He said of his work:

> The Government, perhaps more so than other litigants, has a duty and a responsibility to compensate those injured by the acts of its employees.

Working his way up through the Civil Division of the Justice Department, Jack Farley, in 1978, was assigned responsibility for the representation and defense of individual Federal employee defendants, which exposed him to the particular needs of individuals who find themselves thrust into the court system. In addition, for much of the past decade, while serving as Director of Justice's Tort Branch, Mr. Farley has served on the faculties of various Federal legal training institutions and has delivered hundreds of presentations on constitutional and common law torts to thousands of Federal officials and employees.

His writings and lectures reflect the legal scholarship which made him editor-in-chief of the Hofstra Law School Law Review.

As to his record of military service, while it is certainly a long way from Fort Jackson, SC—where Mr. Farley received his basic training in 1966—to the halls of the Justice Department, where he practices his profession today, the journey has been negotiated with distinction. As a veteran who lost a leg in Vietnam, he knows well the sacrifices made by so many to keep our land free. His four Bronze Star Medals, two Purple Hearts, and the Army Commendation Medal speak volumes about his personal sacrifices.

In closing, I note that the nominees have each completed the committee's extensive judicial questionnaires and have answered prehearing questions, all of which will appear in the record of today's hearing.

Their published writings have been reviewed by committee staff, who have also talked with attorneys with and against whom the nominees have practiced. I reviewed the FBI reports yesterday. We have found no bar to the confirmation of either nominee, and I fully expect to support both of them.

The new Court of Veterans Appeals symbolizes the fact that those whose service has preserved our Government of laws, not of men, are entitled to a full measure of justice in their relations with their Government. Today's hearing shows that our Nation is indeed intent on providing this further protection to those who have so bravely protected us.

[The judicial questionnaires and answers to prehearing questions appear in the appendix.]

Chairman CRANSTON. At this point I am delighted to yield to my friend and ranking member of the committee, Senator Frank Murkowski.

OPENING STATEMENT OF SENATOR MURKOWKSI

Senator MURKOWSKI. Thank you very much, Mr. Chairman. In order to expedite the process, let me echo your remarks in welcoming both our nominees, Mr. Kramer as well as Mr. Farley and

members of Mr. Farley's family who are with us today. I know this is a proud moment for them. We all share, of course, in the opportunity to have such qualified individuals before us, nominated as Associate Judges for the Court of Veterans Appeals.

I have a lengthy statement, Mr. Chairman, of which I will relieve you and the audience by not reading it, and simply ask that it be entered into the record. In the interest of equity, there are the same number of pages for both Mr. Kramer and Mr. Farley, and I thank Mr. Al Ptak and his staff for that. If anybody wants to get into the extraordinary literary capability of the staff, please read them in detail. But I would ask that they be entered into the record.

Chairman CRANSTON. They will appear in the record.

Senator MURKOWSKI. Mr. Chairman, as you may or may not know, I am committed to the Nixon trial, an impeachment trial that is going on and on and on, and if you would excuse me, I wish the nominees well and urge the support of my colleagues.

Chairman CRANSTON. Thank you very much.

[The prepared statements of Senator Murkowski appear on pp. 21 and 23.]

Chairman CRANSTON. We would now welcome whatever remarks each of you would choose to make, and I first recognize you, Mr. Kramer.

Would you wait one moment? Senator Thurmond just arrived.

Do you have any opening remarks to welcome the nominees or comment on the nominees who are before us, Senator Thurmond?

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Chairman, it is a pleasure to be here this morning to consider two nominees to the Court of Veterans Appeals, Ken Kramer, former Colorado Congressman and currently Assistant Secretary of the Army for Financial Management, and John Farley, currently Director of the Torts Branch of the Civil Division of the Justice Department.

Both of these men are excellent nominees and I am pleased to offer my support. Mr. Chairman, I have known Mr. Kramer for a number of years and have found him to be a man of character and integrity. In addition to these traits, he has an outstanding record of public service. His credentials are superb. Mr. Kramer is a magna cum laude graduate of the University of Illinois, where he received the Distinguished ROTC Military Graduate Award, and was selected for Phi Beta Kappa.

After graduating from Harvard Law School he served on active duty as an Army captain in the Judge Advocate General's Corps. His work included serving as counsel to the Army's Physical Disability Evaluation Board, and also as prosecutor and defense counsel in many court-martial cases.

Subsequent to serving in the military, he practiced law, worked as a public prosecutor, served four terms in the U.S. House of Representatives, and is currently the Assistant Secretary of the Army for Financial Management.

I might also mention that during his service in the House he was a very able member of the Armed Services Committee and was a major force in the creation of the Strategic Defense Initiative.

The other nominee for an Associate Judgeship, Mr. John Farley, III, also has excellent credentials. A graduate of Holy Cross College in 1964, Mr. Farley went on to earn a Master's in Business Administration from the Columbia University School of Business, and later earned his law degree in 1973 from Hofstra University School of Law. In 1973 he began work as a trial attorney in the Civil Division of the Justice Department, where he currently serves as Director of the Torts Branch.

In addition, he served in the U.S. Army from 1966 to 1970, and was awarded the Purple Heart Medal with oak leaf cluster.

Mr. Chairman, once these two nominees are approved, they will then join Chief Judge Frank Nebeker and begin hearing the first cases appealed to the new Court of Veterans Appeals. It will certainly mark an historic occasion for the veterans of this country, and I am pleased with this beginning.

Again, Mr. Chairman, I want to thank you for scheduling this hearing. At this time I must leave for another meeting. I appreciate your courtesy, Mr. Chairman, and I wish these nominees well.

Chairman CRANSTON. Thank you very much, Strom.

Now, Mr. Kramer, we welcome whatever remarks you choose to make.

STATEMENT OF HON. KENNETH B. KRAMER, NOMINEE FOR ASSOCIATE JUDGE OF THE U.S. COURT OF VETERANS APPEALS

Mr. KRAMER. Thank you, Mr. Chairman. I will be brief. After hearing all those very kind and generous remarks by former colleagues and Senator Thurmond, I really could not add anything that could be of great benefit to me beyond that.

Chairman CRANSTON. Just don't blow it all. [Laughter.]

Mr. KRAMER. I am just very pleased—well, when you're a judge you have to speak with a more bureaucratic tongue, but that's actually the basic bottom line, don't blow it.

I do want to thank you, Mr. Chairman, for the privilege of coming before you today in consideration of my nomination as Associate Judge to the new U.S. Court of Veterans Appeals. I very much appreciate the kind words of Senator Armstrong and Senator Wirth from my home State of Colorado, and for them appearing before the committee on behalf of my nomination. In the case of Senator Wirth it is especially meaningful because we did meet on the political battlefield, and in fact have become, I think, much better friends as a consequence of that experience than we ever were before. I appreciate his friendship and support.

I very much appreciate having Chief Judge Frank Nebeker come to give his support to this hearing. I know he has been inundated with responsibilities in setting up this very exciting new part of our judicial system, and it's a pleasure and privilege to—hopefully, if confirmed by the Senate— be able to join him in that undertaking.

Mr. Chairman and members of the committee, last October you took historic action in formulating legislation, in the words of the

chairman, to "afford veterans the opportunity for judicial review and the assistance of counsel that they so richly deserve, and eliminate provisions in law that accord veterans second-class citizenship in the very fundamental area of their relationship with the Veterans' Administration in respect to statutory benefits and resources."

After more than a decade of work by you, by members of the committee, and by committee staff, the new U.S. Court of Veterans Appeals is now a reality. Its mission is really simple, to provide justice to almost 75 million veteran, dependent, and survivor beneficiaries. Fulfilling this historic mandate will constitute a tremendous challenge.

To be nominated by our President as an Associate Judge of the court charged with meeting this challenge is a very, very great honor and one which I don't take lightly. I want to assure this committee that indeed, if I am fortunate enough to be confirmed, I will do my very best to provide as fair, as thoughtful, and as independent judicial review as possible to each and every person whose appeal I hear.

Thank you very much, and I would be very happy to answer any questions that anybody might have.

Chairman CRANSTON. Thank you very much.

Mr. Farley?

STATEMENT OF JOHN J. FARLEY III, NOMINEE FOR ASSOCIATE JUDGE OF THE U.S. COURT OF VETERANS APPEALS

Mr. FARLEY. Mr. Chairman and members of the committee, it is the highlight of my career in the law and in public service to be able to appear before you this morning as the President's nominee to be an Associate Judge of the U.S. Court of Veterans Appeals. I realize I have to talk loud to overcome my own daughter, but I will try.

I am grateful to the President for this nomination and for the confidence and trust that it represents. I am very grateful to Senator Sarbanes for appearing this morning on my behalf, and I am also grateful to you, Mr. Chairman, and to the members and staff of this committee for the courtesy and assistance which has been provided to me and to the entire Farley family.

I am hopeful that the committee will report my nomination favorably and recommend confirmation to the full Senate.

As my hopefully soon-to-be-colleague Ken Kramer just indicated, the prospect of becoming an integral part of the new U.S. Court of Veterans Appeals is exciting and at the same time very humbling. The massive potential impact of the court is indeed significant. Approximately 75 million citizens, almost one out of every three Americans, are potential beneficiaries of veterans' benefits, which range from pensions to home loans, from health care to education.

While we as a Nation have a proud tradition of recognizing the debt that we owe to our veterans, their claims have never—until now, until the work of this committee bore fruit—been subject to independent judicial review. It will be the responsibility of this new court to fill that void and to do so in a fair and equitable manner.

The challenge is great, but so too is the excitement and the expectancy of the community of veterans.

If confirmed, I will bring to this task an education with advanced degrees in business and the law. As a disabled Army veteran with both enlisted and commissioned service, Mr. Chairman, I believe that I have a special sensitivity to the needs of the community of veterans to which you alluded in your statement. And I will contribute to the court a sense of experienced legal judgment formed by my 16 years as a Department of Justice litigator and manager of litigation.

I look forward with great anticipation to the signal honor of continuing my career of public service as an Associate Judge of the U.S. Court of Veterans Appeals and in joining Chief Judge Nebeker and Associate Judge Kramer in that effort.

Thank you very much, Mr. Chairman.

Chairman CRANSTON. Thank you very much. It's good that you look upon this as the highlight of a very distinguished career.

I thank you both for your fine and concise statements. I have a very few questions I would like to put to each of you, and Ken, I will start with you.

In writing each of you has clearly given the committee your general views on the nature of the obligation that the Federal Government owes to those who have served on active duty in the Armed Forces, so I won't ask you to repeat those answers this morning.

Ken, let me ask you this. What are your general views on the deference that an appellate tribunal should give to the conclusions and reasoning of an executive branch agency in deciding a claim for benefits from that agency?

Mr. KRAMER. The direction that you indicated in the legislation that you passed last October which was signed into law last November after a great deal of debate provided a broader discretionary standard clearly erroneous in deciding factual issues than the original, more stringent standard that had been part of the earlier drafts. In the final analysis you allowed this court more discretion in analyzing whether or not the conclusions of fact had been correctly arrived at by the Board of Veterans' Appeals.

With respect to matters of law, I believe that you have empowered this court, in appropriate cases, to overturn many of the rules and regulations that the Veterans Department has promulgated that govern award of benefits. This is a much more liberal or wide-ranging standard by which this court can make determinations of equity and fairness than the Board of Veterans' Appeals uses. The BVA must accept those rules and regulations in the administration of their system. And they are also bound, as I understand it, by precedential general counsel opinions.

This court of course, being an independent judicial tribunal, will not be bound by those restrictions. So it's a question of not only seeing whether the Department has applied the law or regulations correctly to the particular fact situation at hand, it is also a question of allowing us to look at whether in fact the regulation or rule that has been promulgated is consistent with the statutory direction that this committee and the Congress has given.

Chairman CRANSTON. Thank you very much.

Jack, would you comment on the same matter?

Mr. FARLEY. I'd be very happy to, Senator.

The legislation, as I read it, with respect to facts, imposes a clearly erroneous standard, which is pretty carefully defined in the law. If we as a court, disagree with the Board of Veterans' Appeals, under that standard we don't have a license merely to just say, "Well, we don't agree with you," and decide it some other way; that's not the standard. If, however, while there may be evidence to support the finding of fact, we believe, viewed on the whole record, that it is an error, then it will be our task and our responsibility to overturn that finding. That's how I understand the "clearly erroneous" standard. So we're not talking about deference in that part of the process.

I believe that deference comes in with respect to the review of law. This enabling act adopts, just about verbatim, the language of the APA, the Administrative Procedures Act, and on review, we are able to hold unlawful or set aside actions if we find them arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Nowhere in the statute is there a mention of deference. But in practice, having litigated this—in fact, just last week, I wrote a brief on it—when an agency is construing its own regulations and its own statute, there is deference given by a reviewing court. But deference does not mean that we cave. The review you seek and the review that will be given is an independent review. The deference would come in listening to and understanding the agency views. They do not necessarily have to be accepted by the court.

Chairman CRANSTON. Thank you very much.

Jack, let me ask you this. Would you ever have any hesitancy in reversing an unlawful VA action in a case that is within the jurisdiction of the Court of Veterans Appeals and properly before the court?

Mr. FARLEY. No, sir.

Chairman CRANSTON. Would you answer the same question?

Mr. KRAMER. Sir, I would have no hesitation, whatsoever.

Chairman CRANSTON. Jack, your career has been one of very distinguished Government service. Do you have any concern that your many years of experience in defending Government officials in litigation may have left you with a pro-Government bias?

Mr. FARLEY. No, Senator, I don't. It's been a privilege to defend Federal employees. I think it's been a major mission. But the reason Federal employees get defended is so that they can do the Government's business free of the fear of having to worry about lawsuits, litigation, liability and having to hire a lawyer. Each case gets looked at separately; and indeed there are times, as you noted earlier, where we have settled based on the judgment that there should be compensation due to negligent or wrongful conduct by the Federal employee.

No, Senator, I have no bias in that regard.

Chairman CRANSTON. Ken, what are your views on that matter in relationship to your own experience?

Mr. KRAMER. Well, sir, hopefully an attorney who is worth his salt can represent whatever client or go into whatever situation that is required of him or her. I conclude, hopefully, that I would fall into that category.

Having been a Government attorney in the Army, and in that situation really having been on both sides of the fence, so to speak, in representing both defendants and also being a military prosecutor as well as representing soldiers in front of a disability board, but at the same time also representing the board, I've probably seen some of those potential areas where one probably could have some bias.

I think a lot really depends on the commitment and attitude of the individual. If I am fortunate enough to be confirmed—I go in with no preconceived notions. I certainly have no bias in favor of the Government; clearly, in my present job, in the matter of reviewing large Army claims, when the Army Claims Service ruled in favor of the Government against a claimant, I have no hesitation, whatsoever, in reversing in those situations where I thought there was justification for making a better award or a better ruling for the claimant.

I have not been a part of either the Veterans' Administration or the Department of Veterans Affairs. My only real knowledge is in talking to people and in the reading that I have done in preparation for this position, about the operations and management of the Department.

I think this court has a mandate to be fair and impartial and I hope I will have an opportunity to make a contribution in that process.

Chairman CRANSTON. Thank you very much.

Jack, I was pleased to note the statement in your reply to my prehearing question number two, that in your years of service as an attorney for the Department of Justice you have "endeavored to ensure that an injured plaintiff was treated fairly," and that you did so based on your "firm belief that the Government, perhaps more so than other litigants, has a duty and a responsibility to compensate those injured by the acts of its employees."

This has always been my view of the Government's special responsibility to those injured or otherwise harmed by, or in connection with, Government action. That is, in weighing various competing considerations on a legal issue involving the Government, the Government—in addition to its interests in protecting Government property, assets, and prerogatives—has a positive interest both in being fair and in appearing to be fair.

Do you agree with that view?

Mr. FARLEY. Yes, I do, Senator.

Chairman CRANSTON. This brings to mind the case of James Thornwell who, as you know, brought suit against the United States for injuries related to his having been—most outrageously, in my view—given LSD without his knowledge by Government employees while he was in the Army. I know about this case from my work as chairman of this committee relating to the private relief legislation that Congress enacted for him, and you have listed the case in your judicial questionnaire as one of the 10 most significant litigative matters with which you have been personally involved.

Could you please give us briefly your thoughts on how, in the Thornwell case, you and the Government met the special responsibility to be fair and to appear fair?

Mr. FARLEY. I would be very happy to, Senator.

When Mr. Thornwell was notified, some 10 to 15 years after he was surreptitiously given the LSD, that he had in fact received it, it was the first time that he learned about it. The suit followed——

Chairman CRANSTON. When was he told that he had been given it?

Mr. FARLEY. There was a followup study, Senator, I believe out of Walter Reed—it may have been out of Edgewood or Aberdeen—many years later, where the Army wanted to study the long-term effects of those who had received the LSD. At the time of the testing, LSD was variously believed to be a truth serum or some kind of agent, and so this test was administered.

They sent letters to the subjects, offering the subjects a free physical, to determine the results of the test. Thornwell had not participated in the test here in the United States; his, in fact, was an actual field test surreptitiously done overseas in Germany, and he knew nothing about it. He was discharged from the Army without being told that he had been given LSD.

However, the doctrine and case which you know well, Mr. Chairman, *Feres* v. *United States,* holds that military men and women may not sue the United States for injuries incident to their military service. It is based on a 1950 Supreme Court case. When Mr. Thornwell brought his suit, he fell under that doctrine—or at least, representing the United States, it was our belief that he did. We filed a motion in the district court here in Washington to throw the case out. However, Judge Richie kept the case pending, did not grant our motion.

I am confident that based on the law, then and now, ultimately Mr. Thornwell would not have prevailed. However, in consultation with his lawyers, many of us felt that this surreptitious administration of an agent during what was a criminal interrogation was not proper behavior for the United States. We don't do this to people who are convicted or in jail; to do this to someone who still has all their rights and properties—there was deep concern about it.

A trial balloon was floated. I honestly do not remember where it started; it may well have started up here on the Hill, that all right, he will probably not be able to receive compensation from the United States under existing law, but this man deserves something, so the private relief effort began.

After dealing at very high levels of Justice, up to Deputy Attorney General, as to what the administration would support I negotiated with his lawyer as to amounts and the process and so forth. We reached an agreement and the Department of Justice supported private relief legislation—I think in excess of $1 million. Ultimately it was cut to the point where Mr. Thornwell received $625,000 under private relief legislation, not through the tort system.

Chairman CRANSTON. What part did you play in this?

Mr. FARLEY. I was the lawyer for the United States in the litigation—actually, I had a couple of lawyers working with me, but I was the senior lawyer—and I was the senior negotiator with both Mr. Thornwell's lawyers and in dealings with the Hill. I testified before the House Subcommittee on Governmental Affairs in support of the legislation on behalf of the Carter administration. I was the designated representative.

Chairman CRANSTON. Did you advocate that approach within the Department of Justice?

Mr. FARLEY. Did I recommend that we support legislation?

Chairman CRANSTON. Yes.

Mr. FARLEY. Yes, Senator, I did.

Chairman CRANSTON. There are a couple of things I would like to ask you about. One, did he suffer some very adverse consequences from the LSD?

Mr. FARLEY. I don't know—there's a very sad, tragic end to this, as you well know. I was giving a speech in California about 5 or 6 years ago—maybe even longer than that now—and I mentioned the case.You are a consummate speaker, Mr. Chairman, and you know audience reactions, but this reaction was strange. I mentioned the case, and the audience started looking at each other. It was a very strange feeling. Finally someone raised his hand and said, "Did you know that Mr. Thornwell died yesterday?" He had drowned in a swimming pool of causes apparently having nothing to do with the LSD. At least, that was the report.

The extent of his injuries that he suffered from the LSD, I can't comment on, Senator. I just don't know. Medical expert testimony would go either way on it. He believed he was injured from it.

Chairman CRANSTON. Were any other cases brought by others who were given LSD at the same time?

Mr. FARLEY. The original case, if memory serves, was the Olson case involving a CIA official, and that was the first model for private relief legislation which the Congress passed some years earlier.

There have been about four or five other cases since then—please don't hold me to the number; I think about four or five—but the Feres doctrine has ended all of them. The difference, Senator, is that those other cases were brought by servicemen who participated in the testing program, signed consent forms, agreed to be tested, probably not knowing—in fact, not knowing—what the agent was, but it was a fairly controlled environment. Mr. Thornwell received LSD in a field test done not as a part of any testing program. He was actually given the LSD for operational purposes. So I think that's the difference. The Feres doctrine has barred those other cases from recovery.

Chairman CRANSTON. Thank you very much.

Ken, you've had a somewhat similar kind of responsibility for the last approximately year and a half as the Assistant Secretary of the Army charged with deciding on tort claim settlements for the Army. Could you comment on the same factor that Jack and I just discussed, about the Government's special responsibility, both to appear fair and to be fair, and how that consideration entered into your actions in deciding on these tort claim settlement decisions which are discussed in your answers to the committee's judicial questionnaire?

Mr. KRAMER. The responsibility that I exercise, designated to me by the Secretary of the Army as Assistant Secretary of the Army for Financial Management, makes me the ultimate review authority for certain claims in excess of $100,000.

By and large, while this is an oversimplification, there is no judicial review of those claims—similar, really, to the situation with

the Board of Veterans' Appeals prior to the establishment of this court.

That, in my view puts a special obligation on me. Where I felt that there was something that was basically out of sync, I called in people from the Claims Service and sat down with them, talked to them about their reasoning in a particular case. In several instances, I have asked for additional information. For example, last week, I dealt with a case where there is a very severe neurological impairment as a consequence of a brain tumor. There is a dispute in the facts as to exactly when the Army should have known that there was a brain tumor. There is clearly, however, from the record a documented negligent delay. It's a question of how long the delay was in finding the tumor and then acting on it appropriately.

In this particular instance the Army Claims Service has taken the position that the delay in the diagnosis and subsequent operation, and then the onset of some very severe conditions subsequent to the operation, really has nothing to do with the vegetative state that the claimant finds himself in today—he's a relatively young boy, probably about 12 or 13 today. The Claims Service says that the severe impairments could have happened just as likely had there been no negligent delay.

In the record are statements of several well-regarded Army physicians that basically uphold the position of the Claims Service, and on which the Claims Service primarily based its position.

This case, interestingly enough, started out as a lawsuit under the Federal Tort Claims Act, but it was a case where there was no jurisdiction to go to court. The exclusive remedy in this case was a claim, and there was no relief in the court system. The court filing did allow, however, some depositions to be taken that probably might not otherwise have been taken in the normal course of an Army claim.

Last week I went out to visit the neurosurgeon at Walter Reed who had rendered one of the statements on which the Claims Service based its position. I learned some things that weren't in the record. He made his determination based on a series of x rays that had been taken on a day-by-day basis subsequent to the surgery. From these he concluded that the neurological conditions with which I am dealing in the claims process were really not caused by the consequence of the delay; they were caused as the consequence of some trauma that set in after the surgery, which might have happened regardless of whether or not there had been a delay in the diagnosis.

There are some very different positions that have been presented on behalf of the claimant, some reports several years old now, in which three expert doctors really testified that the Army's delay in determining the existence of this brain tumor was the cause of the claimant's present disabilities.

I have instructed the Army neurosurgeon to document for me his step-by-step analysis of the x-rays, which is not presently in the file, by which he made his determination. It is then my intent—and hopefully, my successor will follow through—that this report will then be sent to the claimant's experts, who will have an opportunity to comment on it. I think only at that juncture can a fair

determination really be made as to whether the Government is responsible for the significant injuries which this child has sustained.

The determination of liability—it's the kind of case that is either going to be zero, or in excess of $1 million—puts a lot at stake here.

I have tried to bring this kind of thoroughness to my claims responsibility. The fact that I am the final arbiter and that there is really no judicial review to speak of beyond me gives me a special feeling of obligation. I might say that I think the Claims Service does tend to be as fair as it can from its perspective, and it does award people money and other types of relief where it feels it is appropriate. There are many cases that come through that to approve where fair awards have been made. On the other hand, the Claims Service recognizes that there are limited funds available, that the Army's primary responsibility is really to deter war and to fight and win if necessary, and it's not really to be making awards in cases.

So from this perspective, I think it is important for somebody beyond the Claims Service to have a different perspective. I hope that I have been able to provide that perspective. Somtimes I think I have driven a lot of the good people in the Claims Service nuts and they would be very happy to testify on my behalf here in order to see me move on to different pastures. Really, though, it has been very challenging and I've enjoyed the work.

Chairman CRANSTON. Thank you very much.

I think your responses and your records indicate that you both can be and will be very fine and very fair judges. We appreciate that very, very much, and you obviously have the backgrounds and the qualifications to enable you to fulfill that goal.

I know that Senator Mitchell intended to be here to speak about you, Jack; you are a good friend of his. We will enter his statement into the record.

[The prepared statement of Senator Mitchell appears on p. 25.]

Chairman CRANSTON. There will be no objection, so we will schedule a meeting of the committee off the Senate floor to vote on these two nominations this afternoon at the first roll call after 2 o'clock. The committee will convene thereafter next Friday, September 22, to hear testimony on the nominations of various individuals for Labor Department and VA positions. At the present time we anticipate that this will cover five nominations if all the paperwork on them is complete at that time.

If we have no further business this morning, I thank both of you once again, and we stand adjourned.

[Whereupon, at 10:28 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

STATEMENT OF SENATOR TIMOTHY E. WIRTH

Mr. Chairman and Members of the Committee on Veterans' Affairs, I am here today to introduce Ken Kramer to the Committee and give my full support to his nomination to be an Associate Judge on the Court of Veterans' Appeals.

As a former colleague of ours, Ken should be a familiar face to all of us. Ken has had a long and distinguished career in public service. After receiving his J.D. from Harvard Law and serving his country honorably in the United States Army, Ken began his career in public service in the Colorado State legislature in 1973. After serving three terms, Ken came to the U. S. House of Representatives in 1979. Here in Washington, Ken served as Congressman from Colorado's fifth district for eight years and earned himself a reputation as a strong proponent of national defense and the needs of our nation's veterans. After leaving Congress, Ken's expertise was tapped by the Reagan Administration and he went to the Pentagon to become Assistant Secretary for the Army for Financial Affairs. Ken has done a great job in that capacity and I am sure that the Army will miss him sorely when he joins the Court of Veterans' Appeals.

The Court represents an important step forward for veterans. As a body independent from the Department of Veterans Affairs, the Court will provide veterans with a forum in which they can air their grievances and be assured of a fair and complete hearing. A postion as an Associate Judge on this court is important duty and I am sure that Ken Kramer will perform the job admirably.

Thank you, Mr. Chairman.

SEPTEMBER 13, 1989

STATEMENT FOR KEN KRAMER

BY SENATOR WILLIAM L. ARMSTRONG

IT IS WITH GREAT PLEASURE THAT I APPEAR HERE TODAY BEFORE THIS HONORABLE COMMITTEE TO EXPRESS MY STRONG SUPPORT FOR KEN KRAMER.

IT IS WITHOUT HESITATION THAT I STRONGLY STATE THAT KEN KRAMER WILL BE AN EXCELLENT JUDGE FOR THE COURT OF VETERANS APPEALS.

AS MANY OF YOU KNOW, KEN IS A FORMER COLORADO CONGRESSMAN AND PRESENTLY SERVES AS ASSISTANT SECRETARY OF THE ARMY (FINANCIAL MANAGEMENT).

I HAVE KNOW KEN MANY YEARS AND BELIEVE HIM TO BE A PERSON OF THE HIGHEST INTEGRITY AND CHARACTER WHO HAS AN OUTSTANDING RECORD OF PUBLIC SERVICE.

MR. KRAMER IS A GRADUATE OF THE UNIVERSITY OF ILLINOIS WHERE HIS HONORS INCLUDED PHI BETA KAPPA, MAGNA CUM LAUDE, AND DISTINGUISHED ROTC MILITARY GRADUATE. AFTER GRADUATING FROM HARVARD LAW SCHOOL, HE SERVED ON ACTIVE DUTY AS AN ARMY CAPTAIN IN THE JUDGE ADVOCATE GENERAL'S CORPS. HIS WORK INCLUDED SERVING AS: COUNSEL TO THE ARMY PHYSICAL DISABILITY EVALUATION BOARD WHICH DETERMINED RATINGS AND BENEFITS OF DISABLED SERVICE PERSONNEL, AND FOR WHICH HE WAS AWARDED THE ARMY COMMENDATION MEDAL; AND PROSECUTOR AND DEFENSE COUNSEL IN NUMEROUS GENERAL COURTS-MARTIAL CASES.

SUBSEQUENT TO HIS THREE YEARS OF ARMY LAW PRACTICE, AND PRIOR TO HIS ELECTION TO CONGRESS IN 1978, KEN PRACTICED LAW FOR NINE YEARS AS BOTH A PUBLIC PROSECUTOR AND PRIVATE LAW PRACTITIONER. DURING MUCH OF THIS PERIOD, HE ALSO SERVED AS A COLORADO STATE REPRESENTATIVE WHERE HE WAS A MEMBER OF THE JUDICIARY COMMITTEE AND A COMMISSIONER ON THE NATIONAL COMMISSION ON UNIFORM STATE LAWS.

DURING HIS FOUR TERMS IN THE U.S. HOUSE OF REPRESENTATIVES, KEN ESPECIALLY DEDICATED HIMSELF TO NATIONAL DEFENSE MATTERS. HE WAS A MEMBER OF THE ARMED SERVICES COMMITTEE WHERE HE WAS A MAJOR FORCE IN THE CREATION OF SDI AND THE UNITED STATES SPACE COMMAND AND ITS INDIVIDUAL COMPONENT SERVICE COMMANDS. HE ALSO SERVED AS A MEMBER OF THE AIR FORCE ACADEMY BOARD OF VISITORS. HIS LIFETIME VFW VOTING RECORD IS 87 PERCENT.

KEN ALSO HAS SIGNIFICANT EXPERIENCE AS AN ADMINISTRATOR. IN ADDITION TO HIS EIGHT YEARS OF RESPONSIBILITY FOR THE ADMINISTRATION OF HIS CONGRESSIONAL OFFICE, HE IS PRESENTLY THE CHIEF FINANCIAL MANAGEMENT OFFICER OF THE U.S. ARMY IN CHARGE OF A 2,500 PERSON ORGANIZATION RESPONSIBLE FOR: FORMULATION OF THE $80 BILLION ARMY BUDGET; CONGRESSIONAL LIAISON WITH THE HOUSE AND SENATE DEFENSE APPROPRIATIONS SUBCOMMITTEES; DEVELOPMENT OF THE ARMY COST POSITION ON MAJOR WEAPON SYSTEMS, DATA PROCESSING SYSTEMS AND FORCE STRUCTURE; OPERATION OF THE ARMY FINANCE AND ACCOUNTING CENTER; AND, INITIATION OF PRIVATE SECTOR FINANCING AND OTHER BUSINESS MANAGEMENT PRACTICES WITHIN THE ARMY.

IN MAY, 1987 KEN WAS APPOINTED TO THE BUSH FOR PRESIDENT NATIONAL STEERING COMMITTEE AND SOON AFTER WAS APPOINTED AS COLORADO CO-CHAIR OF THE PRESIDENT ELECT'S CAMPAIGN.

IN CONCLUSION, I STRONGLY BELIEVE KEN KRAMER WILL BRING INTEGRITY AND LEADERSHIP TO THE VA COURT OF APPEALS, AND I APPRECIATE THE OPPORTUNITY TO SPEAK ON HIS BEHALF. MANY THANKS!

STATEMENT OF SENATOR FRANK H. MURKOWSKI (R-AK)
UPON THE NOMINATION OF
KENNETH B. KRAMER
TO BE
AN ASSOCIATE JUDGE OF THE COURT OF VETERANS APPEALS

Good morning.

We are here today to consider the nomination of Kenneth B. Kramer to be an Associate Judge of the newly established Court of Veterans Appeals. I am pleased to have the opportunity to present Ken to the Committee.

The President made an excellent choice in nominating Ken to the Court. In the areas of public service and the law, his experiences are extensive.

- Currently serving as Assistant Secretary of the Army for Financial Management;

- A four-term U.S. Representative from Colorado (1979-1986);

- A three-term State Representative of Colorado (1973-1978);

- SEVERAL YEARS OF PRACTICING LAW BOTH WITH PRIVATE FIRMS AND AS A PROSECUTOR IN THE COLORADO DISTRICT ATTORNEY'S OFFICE;

VETERANS WILL BE PLEASED TO KNOW THAT AS A CAPTAIN IN THE U.S. ARMY, KEN NOT ONLY FULFILLED THE WIDE RANGE OF LEGAL DUTIES OF A MILITARY LAWYER IN THE JUDGE ADVOCATE GENERAL'S CORPS, HE ALSO HAD THE OPPORTUNITY TO SERVE AS LEGAL COUNSEL TO DISABLED SERVICEMEMBERS APPEARING BEFORE THE PHYSICAL DISABILITY EVALUATION BOARD.

KEN'S EXPERIENCES IN THE MILITARY, IN PUBLIC SERVICE, AND AS A LAWYER IN GENERAL WILL BE OF GREAT BENEFIT TO HIM AS A JUDGE ON THE NEW COURT. I EXPECT THAT HIS FUTURE DECISIONS, BY THEIR FAIRNESS AND FARSIGHTEDNESS, WILL ENHANCE THE COURT'S REPUTATION IN THE EYES OF THE VETERANS, THE PUBLIC, AND THE LEGAL COMMUNITY.

STATEMENT OF SENATOR FRANK H. MURKOWSKI (R-AK)
UPON THE NOMINATION OF JOHN J. FARLEY, III
TO BE
AN ASSOCIATE JUDGE OF THE COURT OF VETERANS APPEALS

GOOD MORNING.

I AM PLEASED TO JOIN IN WELCOMING JOHN FARLEY BEFORE THE COMMITTEE AS WE CONSIDER HIS NOMINATION TO BE AN ASSOCIATE JUDGE ON THE NEWLY ESTABLISHED U.S. COURT OF VETERANS APPEALS. I ALSO WANT TO WELCOME JOHN'S WIFE KATHLEEN AND THEIR CHILDREN MAURA, BRENDAN, THOMAS, AND CAITLIN.

JOHN'S QUALIFICATIONS TO SIT AS A JUDGE ON THE COURT ARE IMPRESSIVE:

- o NUMBER ONE GRADUATE OF HIS LAW SCHOOL CLASS AT HOFSTRA UNIVERSITY IN NEW YORK;

- o ADMITTED TO PRACTICE BEFORE THE FOLLOWING COURTS:

  - COURT OF APPEALS OF THE DISTRICT OF COLUMBIA;
  - U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA;
  - U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA;
  - SUPREME COURT OF THE STATE OF NEW YORK; AND
  - U.S. SUPREME COURT.

- Sixteen years of legal practice with the U.S. Department of Justice, progressing from a trial attorney to Assistant Director to Director, Torts Branch, Civil Division.

Of special interest to veterans is the fact that John spent four years in the U.S. Army. He started as an enlisted man and worked his way up to captain in the artillery. His wounds in Vietnam, however, resulted in his medical retirement from the military service, but not before he was awarded four Bronze Star medals for valor, two Purple Hearts, and an Army Commendation Medal.

I expect John will have a speedy confirmation and a rewarding tour of duty as an Associate Judge on the Court of Veterans Appeals.

Statement
Senator George J. Mitchell
September 13, 1989
Veterans' Affairs Committee

Mr. Chairman,

I am pleased to join you and other members of the Committee at this morning's hearing to consideration the nominations of Kenneth Kramer and John Farley to be Associate Judges of the United States Court of Veterans Appeals.

I congratulate both Mr. Kramer and Mr. Farley on their nominations.

The nominees appear to be well qualified for the important positions for which they have chosen by President Bush based on their experience, education and previous public service. As an aside, Mr. Chairman, I'm pleased to note that both nominees are veterans and I believe they will be outstanding additions to this bench.

Mr. Kramer, of course, is a former Representative from the State of Colorado and presently serves as Assistant Secretary of the Army for Financial Management.

Mr. Farley is currently the Director of the Torts Branch in the Civil Division in the Department of Justice, a position he has held since 1980. Previously, Mr. Farley served as the Assistant Director of the Official Immunity Torts Branch for two years and was a Trial Attorney in the Civil Division for a number of years.

Following this Committee's consideration and action by the whole Senate, these two nominees will join with Frank Nebeker in forming a quorum which will allow the Court of Veterans Appeals to start operation. When that occurs, veterans at long last will be provided the "day in court" a fundamental right which most Americans take for granted.

Taken in tandem with establishment of the Department of Veterans Affairs, this new Court demonstrates the appreciation of this nation for those who have served in the armed forces and our nation's obligation to those same individuals.

Mr. Chairman, as one who has labored with you and the other members of this Committee for many years to secure judicial review of Veterans Administration adjudication decisions, today's hearing is a gratifying event and a testiment to your strong leadership.

Again, I welcome the nominees and their families. I look forward to working with the Chairman, the Ranking Member and the other members of this committee in securing quick Senate consideration of this nominations so that this important court can begin hearing cases as soon as possible.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: Kramer (LAST) Kenneth (FIRST) Bentley (OTHER)

Present address: 1400 S. Joyce St. C801 (CITY) Arlington (STATE) VA (ZIP CODE) 22202

Position to which nominated: Associate Judge U.S. Court of Veterans Appeals

Date of nomination: 5/5/89

Date of birth: 19 (DAY) 2 (MONTH) 42 (YEAR)

Place of birth: Chicago, Illinois

Marital status: divorced

Full name of spouse: NA

Names and ages of children:

Kenneth B. Kramer, Jr.	12/8/69
Kelly J. Kramer	10/28/72

Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
Harvard Law School Cambridge, MA	9/63-6/66	JD	6/66
University of Illinois Champaign, IL	9/60-6/63	BA	6/63
Grinnell College ~~Grinnell, IA~~	9/59-6/60	--	--
Niles Township HS ~~Skokie, IL~~	11/56-6/59	HS Diploma	6/59
Hirsch HS ~~Chicago, IL~~	2/55-11/56	--	--

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

ATTACHMENT #1

ATTACHMENT #1

AWARDS AND HONORS

Phi Beta Kappa; Magna Cum Laude; Distinguished ROTC Military Graduate; Who's Who in America; Who's Who in Government; Who's Who in the West; Who's Who in Colorado; Outstanding Young Men in America; Distinguished Americans; Taxpayers Best Friend, National Taxpayers Union; Guardian of Small Business, National Federation of Independent Business; Watchdog of the Treasury, National Associated Business, Inc.; Distinguished Service Award, Production Credit Association; Distinguished Service Award, Americans for Constitutional Action; Distinguished Service Award, Colorado Air Force Association; Medal of Merit, Colorado Air Force Association; Congressional Award of Merit, National Coordinating Council on Emergency Management; Legislative Award for Outstanding Service, Coalition for Peace Through Strength; Distinguished Service Award, Colorado Springs Chamber of Commerce; Honorary Member, Rotary Club of Colorado Springs; and Honorary Member, Tri-Lakes Chamber of Commerce.

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
ATTACHMENT #2		

Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

ATTACHMENT #3

Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

ATTACHMENT #4

25-740 0 - 90 - 2

ATTACHMENT #2

MEMBERSHIPS AND OFFICES HELD

ORGANIZATION	OFFICE HELD	DATES
Colorado Bar Association Denver, CO		1969/present
American Bar Association Chicago, IL		1970/1988 1989/present
El Paso County Bar Association Colo. Spgs., CO		1972/present
U.S. Space Foundation Colo. Spgs., CO	Chairman, Vice-chairman, Director	1983/present
Board of Visitors United States Air Force Academy Colo. Spgs, CO	Board member	1979/1986
Retired Officers' Association Colo. Spgs., CO		1979/1988
March of Dimes Colo. Spgs, CO	Director, Executive committee member	1982/1984
Aries Properties, Inc. Colo. Spgs, CO	Vice-president	1987/1987
First Colorado Land Development, Ltd.	Director	1987/1987
Garden of the Gods Club Colo. Spgs., CO		1987/present
American Security Council Foundation Boston, VA	Director	1987/1988
Pentagon Officers' Athletic Association The Pentagon Washington, D.C.		1988/present
Washington Ski Club Arlington, VA		1988/present
Metropolitan District of Washington Officers' Club Washington, D.C.		1988/present
Ft. Myers Athletic Club Ft. Myers, VA		1988/present
American Legion #5 Colo. Spgs., CO		1980/1980 1983/1986

ATTACHMENT #3

EMPLOYMENT RECORD

TITLE	EMPLOYER	LOCATION	DATES
Consultant and Asst. Sec. Army (Financial Mgmt)	Dept. of the Army	The Pentagon Washington, D.C.	4/88-present
Vice President	Aries Properties, Inc.	Colo. Spgs., CO	3/87-11/87
U.S. Representative	U.S. House of Representatives	Washington, D.C.	1/79-1/87
Colorado State Representative	State of Colorado	Denver, CO	9/73-1/79
Student	Part time cafeteria work for Harvard University	Cambridge, MA	9/65-6/66
Legal Intern	1st National Bank of Chicago	Chicago, IL	6/65-9/65
Student	Part time cafeteria work for Harvard University	Cambridge, MA	9/64-6/65
Warehouseman	Cotter & Co.	Chicago, IL	6/64-8/64
Student	Part time clerical work for Harvard University	Cambridge, MA	9/63-6/64
Cadet	Army ROTC Summer Camp	Ft. Riley, KA	6/63-8/63

ATTACHMENT #4

MILITARY SERVICE

1/67-4/70 Active Duty
Captain, USA
Honorable Discharge

Fitzsimons Army Medical Center Aurora, CO 6/69-4/70	Legal counsel, Physical Disability Evaluaton Board, Physical Evaluation Agency
Ft. Lewis Ft. Lewis, WA 5/67-6/69	Prosecutor, defense counsel, legal assistance officer, and military administrative law officer
Charlottesville, VA 2/67-4/67	Student, Judge Advocate General's course
Ft. Lee, VA 1/67-2/67	Student, Judge Advocate General's Phase I Course

Government experience: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

Commissioner, Commission on Uniform State Laws

Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

During my service in Congress, I had many articles published in newspapers and magazines and in several books. To the extent that these can be located, they have been given to the Pioneer Museum in Colorado Springs, CO.

Political affiliations and activities:

1. List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

ATTACHMENT #5

2. List all elective public offices for which you have been a candidate and the month and year of each election involved.

U.S. House of Representatives 11/88
U.S. Senate 11/86
U.S. House of Representatives 11/84
U.S. House of Representatives 11/82
U.S. House of Representatives 11/80
U.S. House of Representatives 11/78
CO State Representative 11/76
~~CO State Representative 11/74~~

ATTACHMENT #5

MEMBERSHIPS, OFFICES AND SERVICES

Bush for President: member, National Steering Committee and Colorado co-chair; Vice Chairman, National Republican Congressional Committee, Washington, D.C.; Vice Chairman, Republican Study Committee, Washington, D.C.; member, Colorado State Republican Finance Committee; member, Colorado State Republican Central Committee; member, El Paso County Republican Central Committee; delegate, Republican National Convention; delegate, numerous Colorado state and county conventions; and worker for numerous Republican candidates.

FINANCIAL CONTRIBUTIONS

George Bush Presidential Campaign- $250.00
Committee to Re-elect Ken Kramer- $200.00
Ken Kramer '86- $300.00
Orrin Hatch Senate Campaign- $100.00
Don Ritter Congressional Campaign- $100.00
Dan Schaefer Congressional Campaign-$100.00
El Paso Republican Party- $25.00
Cliff Dodge State Senate Campaign- $25.00
Freda Pounstone Mayor's Committee- $50.00
Charley Emley Mayor's Re-election Committee- $25.00
Contribution to unknown candidate in 1979- $50.00

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.

Yes

2. State whether you have any plans after completing government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

No

3. What commitments, if any, have been made to you for employment after you leave Federal service?

None

4. (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

Yes

5. (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

NA

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

Contingent liability on $58,000 loan guaranteed by Veterans Administration, relating to my former residence in Colorado Springs, CO which I sold in 1988.

3. Describe any business relationship, dealing, or financial transaction which you have had during the last five years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

4. Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

I was Vice-president of Aries Properties, Inc., and in that capacity served, in part, as a registered lobbyist pertaining to the authorization and appropriation of national defense space activities impacting Colorado Springs, CO.

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

Termination report filed with Congress on 12/21/87.

Testifying before the Congress:

1. Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes

2. Do you agree to provide such information as is requested by such a committee?

Yes

Kramer

ADDITIONAL QUESTIONS FOR NOMINEES
TO THE UNITED STATES COURT OF VETERANS APPEALS
(To Be Made Public)

Bar associations: List all bar associations and legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Chicago Bar Association	1970-1970
National District Attorneys Association	1970-1972
Colorado Bar Association	1969-present
American Bar Association	1970-1988
El Paso County Bar Association	1972-present
Commissioner, National Commission on Uniform State Laws	1977-1978

Court admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

State of Colorado	4/16/69-present
U.S. Supreme Court	7/14/80-present
U.S. Court of Military Appeals	4/17/67-present
State of Illinois	11/29/66-1973**

** (License lapsed for failure to pay registration fees. I learned of registration fee requirement in process of preparing this form. License can be reinstated upon payment of back fees.)

Judicial office: State (chronologically) any judicial offices you have held and whether you were elected or appointed to them and provide a description of the jurisdiction of each such court.

NONE

Judicial opinions:

NA

If you are or have been a judge, attach a statement providing (a) citations for the ten most significant opinions you have written, (b) a short summary of and citations for all appellate opinions either reversing your decision or confirming it with significant criticism of your substantive or procedural rulings, and (c) citations for significant opinions on federal or state constitutional issues, together with citations for any appellate court rulings on your decisions in those cases. (If any of the opinions listed were not officially reported, please provide copies of the opinions.)

Speeches:

Attach copies of all speeches you have given on issues involving constitutional law, legal policy, or matters relating to veterans' benefits. If there were press reports of any such speeches and they are readily available to you, please provide them.

During my service in Congress, I gave several speeches on Law Day and to bar groups. They were probably general in nature, and to the extent they were written, were donated, along with all other congressional papers, to the Pioneers Museum in Colorado Springs, Colorado. No copies are in my possession.

Legal career:

1. Attach a chronological description of your law practice and experience after graduation from law school, including (a) whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk, (b) whether you practiced alone, and if so, the addresses and dates, and (c) the dates, names, and addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the nature of your connection with each.

2. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

SEE ATTACHMENT #1

ATTACHMENT #1

Assistant Secretary of the Army
Financial Management
Washington, D.C.
(1988-present)

Although a law degree is not required, legal skills are used daily. I am chief financial officer of the U.S. Army in charge of 2,500 person organization. Responsible for :formulation and execution of $80 billion Army budget; congressional liaison with House and Senate Defense Appropriations subcommittees; development of Army cost position on major weapons systems, data processing systems and force structure; operation of Army Finance and Accounting Center; and, initiation of private sector financing and other business management practices within the Army.

U.S. Representative
Fifth Congressional District
Colorado
(Four Terms: 1979-1986)

Although a law degree is not required, legal skills were used regularly, especially in that part of work directly involved in the legislative process. In this regard, I actively participated in the drafting of bills and amendments involving a wide range of issues.

Floyd, Kramer and Lambrecht
Colorado Springs, Colorado
(1975-1978)

Partner in a general law practice of three attorneys where I primarily dealt in areas of personal injury, real estate, divorce, corporations, partnerships, and general business matters.

Holme, Roberts and Owen
Colorado Springs, Colorado
(1972-1974)

Associate in a large law firm where I practiced primarily in areas of real estate, partnerships, corporations, banking, and general business matters.

State Representative
18th Representative District
Colorado
(Three Terms: 1973-1978)

Although a law degree is not required, legal skills were used regularly, especially in that part of work directly involved in the legislative process. In this regard, I actively participated in the drafting of bills and amendments involving a wide range of issues.

Deputy District Attorney
Fourth Judicial District
Colorado
(1970-1972)

Served as prosecutor starting with traffic violations and ending with major felonies.

Lord, Bissell and Brook
Chicago, Illinois
(1970)

Associate in a large law firm whre I practiced exclusively in insurance defense litigation including aviation, dram shop and corporate liability matters.

Captain, United States Army
Judge Advocate General's Corps
(1967-1970)

Served as: prosecutor and defense counsel in numerous general courts-martial cases; legal assistance officer focusing on wills, divorce, and debtor-creditor matters; military administrative law practitioner; and as legal counsel to the US Army Physical Disability Agency where I represented disabled servicemembers before the Physical Disability Evaluation Board.

Kirkland and Ellis
Chicago, Illinois
(1966)

Temporary associate in large law firm where I did legal research and writing on wide range of corporate issues (awaiting 1967 entry on active duty, U.S. Army).

Trust Department
1st National Bank of Chicago
Chicago, Illinois
(1965)

Summer clerk where I did legal research and writing on trust department issues.

3. Describe your typical former clients and the areas, if any, in which you have specialized.

Type of client was dependent on where I was practicing and have ranged from very large corporations to small businessmen to disabled servicemen. Areas of concentration of practice are listed in answer 1-2.

4. State whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court has varied over time, describe each such variance, giving dates.

Frequency of court appearances reflect where I have been employed as listed in answer 1-2 and are as follows:

Floyd, Kramer & Lambrecht	Occasionally
Holme, Roberts and Owen	Occasionally
Deputy District Attorney	Frequently
Lord, Bissell and Brook	Occasionally
Judge Advocate General's Corps	
Prosecutor/defense counsel	Frequently
Military administrative law	Not at all
Legal assistance officer	Not at all
Legal counsel, Physical Disability Evaluation Board**	Frequently
Kirkland and Ellis	Not at all
1st National Bank of Chicago	Not at all

** Appearances before military board comprised of Army Colonels, one of whom was a medical doctor.

5. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel, and identify the courts.

SEE ATTACHMENT #2

ATTACHMENT #2

In virtually all cases, I was sole counsel:

Approximately 20	District Court, El Paso County, CO
Approximately 50	County Court, El Paso County, CO
Approximately 2	Municipal Court, City of Colorado Springs, CO
Approximately 50**	General courts-martial, Headquarters, U.S. Army Garrison and Training Center, Ft. Lewis, WA
Approximately 2	Special courts-martial, Headquarters, U.S. Army Garrison and Training Center, Ft. Lewis, WA
Approximately 20	Physical Disability Evaluation Board, HQ USA Physical Disability Agency with station Fitzsimons General Hospital, Denver, CO

** Includes cases in which a plea was entered and in which there was a contested sentencing procedure.

Litigation: Attach a statement describing the ten most significant litigated matters which you personally handled. Give the citations of cases that were reported and the docket numbers and dates of those that were not. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case--

(a) the dates of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the names, addresses, and telephone numbers of the individuals who were co-counsel with you and principal counsel for each of the other parties.

SEE ATTACHMENT #3

Legal activities: Attach a statement describing the ten most significant legal activities you have pursued (other than the litigated matters referred to above). Describe the nature of your participation, but please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

SEE ATTACHMENT #4

Outside employment: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, please provide details.

NO

Party affiliation: State (a) your current political party affiliation and the place and date it was established, and (b) if you have in the past registered as being with a different party (or as an independent if not now registered as an independent), the place and inclusive dates of such registration.

Democrat- Cook County, Illinois 1963-1970

Republican- El Paso County, Colorado 1971-present

ATTACHMENT #3

Because I do not have any of my litigation files and because my most significant litigation matters occured when I was a Deputy District Attorney, El Paso County, CO (1970-1972) and Judge Advocate, US Army (1967-1970), I approached both organizations about locating my former cases. Unfortunately, it appears that both maintain filing systems by which cases can be retrieved based only on the names of the parties or based on case numbers. As I do not know the names of the parties (who are not governmental entities), nor case numbers, it becomes virtually impossible to obtain all of the requested information.

In the case of the District Attorney's office, I have been advised that while cases are held in a storage room at the courthouse which could theoretically be manually searched for the identification of counsel of record, the room has been sealed because of the presence of asbestos.
As a Deputy District Attorney, my most complex cases involved rape, aggravated robbery, and embezzlement. My superiors were Robert Russell, who was then District Attorney and William J. Hybl, who was then Assistant District Attorney. Their present addresses and phone numbers are:

Robert Russell
660 Southpoint Court
Colorado Springs, CO 80903
719-579-6500

William J. Hybl
El Pomar Executive Building
Colorado Springs, CO 80901
719-633-7733

Judges whom I appeared before as a Deputy District Attorney are:

Hunter Hardeman (retired District Court Judge)
5 Studio Place
Colorado Springs, CO 80918
719-473-1747

Robert Cole (former County Court Judge)
105 E. Vermijo
Colorado Springs, CO 80903
719-633-0264

Jack Roeser (retired County Court Judge)
1307 Adams Drive
Colorado Springs, Colorado 80904
719-632-4776

ATTACHMENT #3

The attorney who was most often principal counsel for the defendent is Richard Webster, former public defender and former County Court Judge. His address and phone number are:

Richard Webster (Municipal Judge and Small Claims Referee)
County Court Judicial Building
Colorado Springs, CO 80903
719-630-2977

In addition, other attorneys in Colorado Springs whom I believe appeared on behalf of various defendents whom I prosecuted include:

James S. Bertagnolli
407 S. Tejon
Colorado Springs, CO 80903
719-471-1657

F.M. (Cuba) Callaway
320 S. Cascade Ave.
Colorado Springs, Co 80903
719-634-8828

Thomas C. Donavan
111 E. Cimarron
Colorado Springs, CO 80903
719-473-0650

Lindsay E. Fischer
Colorado Natl. Bank Exchange Bldg
Colorado Springs, CO 80904
719-473-4657

Thomas D. Gresham
720 N. Tejon
Colorado Springs, CO 80903
719-636-3327

Charles J. Haase
Holly Sugar Bldg
Colorado Springs, CO
719-630-3500

William Kirkman
3 S. Tejon
Colorado Springs, CO 80903
719-471-4780

Justin Melat
711 S. Tejon
Colorado Springs,CO 80903
719-475-0304

Richard L. Tegtmeier
518 N. Nevada
Colorado Springs,CO 80903
719-471-1984

ATTACHMENT #3

With regard to my Judge Advocate General's Corps service, my most complex litigation matters involved felony type criminal cases and disability cases involving serious war injuries incurred in Viet Nam. With the help of the Army Judge Advocate General's Corps, I have located the names of military attorneys, military judges and Physical Disability Board members with whom I was involved. Per my request, the Judge Advocate General's Corps is now attempting to locate present addresses and phone numbers for those individuals who may be locatable.

In addition, on the civil side, as a partner in Floyd, Kramer and Lambrecht, I personally developed, negotiated and settled several personal injury cases which resulted in substantial compensation for my clients. I also represented a general contractor who was sued by a realtor-homeowner whose expensive residence was custom built by my client. The plaintiff brought substantial claims for contract breaches involving overruns and quality of workmanship, and for misrepresentation. While I have been advised by my former partner, R. Dennis L. Lambrecht, P.C., 105 E. Vermijo, Colorado Springs, Colorado, 719-578-1942, that he only maintains records seven years, I have been able to obtain the following information from the El Paso County, Colorado, District Court, regarding the general contractor case:

Name: Joseff N. and Anna H. Ortiz, plaintiffs vs Thorvald Aksland, individually, and d/b/a Thor Homes, Thor Homes, Inc., a Colorado corporation, and J. Elaine Wolter, Public Trustee of El Paso County, Colorado, defendents.

Number: 87353

Court: District Court, El Paso County, Colorado, Division 7

Judge: Robert W. Johnson (presently: Johnson and Stevenson, 1528 N. Tejon, Colorado Springs, Colorado 80903, 719-635-5181)

Attorneys: Plaintiff: Dwight A. Young (last known address: 1608 E. Pikes Peak, Colorado Springs, Colorado 80903)
Defendents (other than Public Trustee): Floyd, Kramer & Lambrecht by Kenneth B. Kramer

Disposition: Judgement for defendents

ATTACHMENT #4

1. I was a member of the Judiciary Committee of the Colorado House of Representatives for five years. The Committee had jurisdiction over most matters pertaining to the Colorado court and justice systems.

2. Served as the Colorado House of Representative designee to the National Commission on Uniform State Laws. As a consequence, I served as a Commissioner of this organization whose purpose is to recommend to the several states model uniform legislation on a variety of subjects.

The other eight most significant legal activities involve substantial participation in the formulation and drafting, as both a State and U.S. Representative, of the following bills or resolutions to:

3. Constitutionally revise the Colorado death penalty statute after the U.S. Supreme Court invalidated most then existing state capital punishment laws. Enacted.

4. Consolidate a morass of special district governing authorities under the power of the county commissioners. No activity because of widespread political opposition.

5. Establish a balanced workfare program as a condition of eligibility for public assistance. Enacted.

6. Extend court decisions decided under the equal protection clause of the 14th amendment, which prohibited discrimination based on race and national origin, to discrimination based on sex. No hearing was held.

7. To require the Department of State to study and report on the need to negotiate an agreement with Mexico which would provide for sending American volunteers to work on Mexican grassroots economic development. Passed the Congress but State Department refused to pursue the concept.

8. Require the Army to consider and report on the feasibility of accelerating hazardous waste cleanup of Rocky Mountain Arsenal. Enacted as an amendment to the 1985 Department of Defense Authorization Act.

9. Create the U.S. Air Force Space Command. As a consequence of the bill, relevant report language was included in the Defense Authorization Act of 1982. Soon thereafter, the Air Force formed the command.

10. Create the United States Space Command, create a separate Department of Defense agency to perform research on directed energy applications for strategic defense, and to study and evaluate the potential of strategic defense as an arms control mechanism to reduce reliance on nuclear weapons. A full committee hearing of the House Armed Services Committee was held and both the command and the Strategic Defense Initiative Organization were formed thereafter. Arms control possibilities are still being considered.

Memberships in certain organizations: The American Bar Association's Commentary to Canon 2 of its Code of Judicial Conduct states, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Do you currently belong, or have you belonged, to any organization which discriminates in this manner -- through either formal membership requirements or the practical implementation of membership policies? If so (a) list all such organizations of which you are or were a member, (b) provide the dates of your memberships, and (c) describe in each case the efforts you made to try to change the organization's discriminatory policies or practices.

Cub/Boy Scouts	unknown
Sigma Alpha Mu (college fraternity)	1960-1963
Moose	1976-1978

All limited membership at that time to males.

Services for disadvantaged persons: The American Bar Association in its Comment to Rule 6.1 of its Model Rules of Professional Conduct calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Attach a statement describing what you have done to fulfill this responsibility, listing specific instances and the amount of time devoted to each.

Served as director of the Pikes Peak Mental Health Center, El Paso County, Colorado, from 1976-1978. In this capacity, I attended monthly board meetings and visited Center facilities including those for drug and alcohol treatment, emotionally disturbed youth, and community corrections. I was Director of the March of Dimes, El Paso County, Colorado, from 1982 to 1984. While my congressional duties did not permit me to attend board meetings, I was involved on several weekends with special events to either raise funds or provide positive publicity. While a member of the state legislature and U.S. House of Representatives, I visited and was briefed on the following: Colorado State Penitentary; Denver Action program; independent living facilities for the mentally impaired; Colorado Deaf and Blind School; boys' ranch for the emotionally disturbed; halfway house for former prison inmates; numerous nursing homes and senior facilities; and domestic violence and battered women's facilities. I also participated in fundraising events for a number of organizations dedicated to the eradication of specific diseases; was a regular annual fundraiser for the Allied Jewish Federation; presented my "People to People" program (see attachment #4, answer #7) to a number of Hispanic organizations; and actively worked to bring relief to Mexican earthquake victims. Over the years, I have also made modest financial contributions to many of these activities.

Selection process:

Has anyone involved in the process of selecting you as a nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

NO

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

MAY 16 1989

The Honorable Alan Cranston
Chairman
Committee on Veterans Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Kenneth B. Kramer, who has been nominated by President Bush to be a Judge of the U.S. Court of Veterans Appeals.

We have reviewed the report and also have obtained advice from the Department of Veterans Affairs concerning any possible conflict in light of the Court's functions and the nominee's proposed duties. Based thereon, I believe that Mr. Kramer is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Donald E. Campbell

Donald E. Campbell
Deputy Director

Enclosure

PRE-HEARING QUESTIONS SUBMITTED BY SENATOR ALAN CRANSTON TO COURT OF VETERANS APPEALS ASSOCIATE JUDGE DESIGNATE HONORABLE KENNETH B. KRAMER

1) Please provide an explanation of the following two votes which you cast while serving as a member of the United States House of Representatives:

   A) June 2, 1983 --against passage of H.R. 3133, the fiscal year 1984 HUD-Independent Agencies Appropriations Act, which contained appropriations for the Veterans' Administration.

   B) November 13 1985 -- against passage of H.R. 3038, the fiscal year 1986 HUD-Independent Agencies Appropriations Act, which also contained appropriations for the VA.

2) Please describe the aspects of your record in the Congress and other federal service that would lead a veteran or veteran's dependent or survivor seeking assistance form the Federal Government to believe that you would give his or her case sympathetic consideration.

RESPONSES TO PRE-HEARING QUESTIONS SUBMITTED BY SENATOR ALAN CRANSTON TO COURT OF VETERANS APPEALS ASSOCIATE JUDGE DESIGNATE HONORABLE KENNETH B. KRAMER

QUESTION 1 A&B

I believe that years of huge deficit spending have resulted in great economic danger. When voting during my years in Congress, I attempted to balance the urgent need to solve this problem with the vital funding needs of our nation. In reviewing HR 3133 and HR 3038, I have concluded that my "no votes" on June 2, 1983 and November 13, 1985 were based on a belief that these bills were too costly. Both were significantly over the President's budget, in excess of $4.5 billion and $7 billion respectively. I also noted during my review that VA funding was lower in both bills than the President's request and thus certainly would have been supported by me as stand alone items.

QUESTION 2

Army Service. I served as a Captain in the US Army from 1967-1970. Several of my assignments provided me substantial experience with and knowledge of the broad range of legal problems to which soldiers and their families can be exposed. As a legal assistance officer at Ft. Lewis, Washington, I focused on debtor-creditor and general family law matters that often involved low income service personnel. As legal counsel to the US Army Physical Disability Agency at Fitzsimons Army Medical Center, Colorado, I represented disabled servicemembers, many of whom had combat injuries, before the Physical Disability Evaluation Board. In both assignments, I represented my clients with total dedication to their interests.

Congressional Service. My former Congressional District has a very substantial number of veterans. As a congressman, a large percentage of the casework which my office did, and on which I put a heavy emphasis, related to veterans matters. These cases involved the full spectrum of benefits. During my congressional service, I was involved in a wide variety of veterans issues. A representative sample is included in the news articles attached as APPENDIX 1. I have also attached as APPENDIX 2 a list of veterans related legislation which I co-sponsored from 1981-1986.

The Veterans of Foreign Wars is the only veterans organization, of which I am aware, which maintains voting records on veterans legislation. The VFW record measures votes on both veterans and national defense legislation. My lifetime combined voting record is 87%.

RESPONSES TO PRE-HEARING QUESTIONS-continued

While not dispositive on the question of suitability, what others think is sometimes important. Attached as APPENDIX 3 is a copy of a letter from Disabled American Veterans indicating its endorsement of me for a judgeship on the U.S. Court of Veterans Appeals. In addition, I have also received the prenomination endorsement of approximately 120 Senators and Representatives. If you are interested in having copies of these endorsements, I will be happy to provide them.

Department of Defense Service. As Assistant Secretary of the Army (Financial Management), I have been delegated, pursuant to a number of claims statutes, final review authority by the Secretary of the Army. Such review authority includes claims under the Foreign Claims Act, the Military Claims Act and the National Guard Claims Act for claims in excess of $100,000 and claims in any amount that have been appealed by a claimant.

I have not hesitated in what I believed to be appropriate instances, in rejecting the position of the U.S. Army Claims Service and obtaining a result more favorable to the claimant. Summaries, with names expunged, which cover two such cases both before and after my review, are attached as APPENDIX 4.

Finally, I am also providing you with a copy of my answer, previously submitted to the Committee, to that part of your "Additional Questions For Nominees To The United States Court of Veterans Appeals" relating to "Services for disadvantaged persons," which I have enclosed as APPENDIX 5.

Survivor seeking benefits

By Betsy Lumbye
Colorado Springs Sun

When Helene Knapp's husband volunteered to fight in Vietnam, he assured his wife the family would be taken care of if anything happened to him.

Col. Herman Knapp became Missing in Action in 1967 and was declared dead 11 years later.

In another year, the Knapps' two children will be ready to go to college, but unless action is taken to restore benefits cut in the 1982 federal budget, they won't get their promised aid for college.

"We're not crying poverty," Mrs. Knapp told *The Sun*.

"We're saying that we want the moral commitment made to our men upheld to our children."

Mrs. Knapp is co-chairwoman of the local chapter of Survivors of Sacrifice, a national, kitchen table network of widows and children of men killed in active duty in the armed forces.

No stranger to humanitarian causes, Mrs. Knapp was national coordinator of the American League of Families of Prisoners and Missing in Southeast Asia for 1972-73.

Members of SOS are fighting through a campaign of letters to [illegible] and through public speaking appearances to restore Social Security benefits cut last fall.

Please see Kin, [illegible]

Kin

Continued from 1-A

The group's founder, a California woman, sent President Reagan the flag sent to her when her husband was declared missing.

She wrote the president that if the government wasn't honoring its commitment, it could have the flag back, and that the flag could be used for another man, saving a few dollars.

A Reagan aide returned the flag.

Now the woman is lobbying full time in Washington.

The [illegible] benefit was [illegible] for children 18-22 years old. Only children enrolled in college in May 1982 will continue to receive benefits, and those will be phased out with a 25 percent reduction per year, Mrs. Knapp said.

Some mothers of high school seniors made their children enroll in Pikes Peak Community College last spring, while the children were still in high school, so they would qualify for benefits in the fall, she said.

Also cut were the [illegible] widows' benefits, which now will be eliminated when the youngest child turns 16, rather than 18, as before.

Mrs. Knapp said she is more concerned about the student's benefits because the children's loses were the greatest.

They have "suffered enough," she said.

The group started in March and has 30 members who meet every other week.

For information, call Penny Steadman at 596-2177 or Joann Widdis at 597-6972.

Sen. Gary Hart, D-Colo.; Rep. Ray Kogovsek, D-Colo., [illegible] Sen. William Armstrong has not participated, she said.

The Colorado Springs chapter of SOS

SUN 10/7/82

VFW committee endorses Kramer

U.S. Rep. Ken Kramer's re-election bid was formally endorsed Wednesday by the national political action committee of the Veterans of Foreign Wars.

Kramer, a Republican, is the lone member of the Colorado House delegation to be endorsed by the VFW.

Lewis Romans, Colorado representative of the VFW's national committee, announced the endorsement during a news conference at the Veterans Memorial in Memorial Park.

Romans said Kramer "has consistently voted in support of American veterans and in support of a strong national defense."

He praised Kramer for consistently supporting adequate spending levels for Veterans Administration hospitals and various health care programs.

"Kramer has been a strong and effective supporter of measures designed to accomplish the rebuilding of our national defense capabilities," Romans said. "He recognizes that our homeland defense has been sorely neglected in recent years and (has worked) to make certain that funding is provided for sufficient weaponry, research and operations in our military."

Romans also praised Kramer for being "one of the most accessible and sincere" congressmen on Capitol Hill.

MIA families: Not knowing takes toll

10/21/84

By Liz Lewis
Colorado Springs Sun

The uncertainty felt by families of servicemen listed as missing in action is much harder to accept than the death of loved ones, the wife of an MIA said Saturday.

Anne M. Wolfkeil, wife of Air Force Col. Wayne B. Wolfkeil, received word that her husband's plane crashed into the side of a mountain 16 years ago. His remains were not found.

"The shock hasn't worn off yet," Mrs. Wolfkeil said. "When someone dies, you can accept that they're dead, but when someone is missing, you can't accept that."

Of 2,483 people listed as missing in action or otherwise unaccounted for in Southeast Asia as a result of the Vietnam War, 41 were from Colorado, including 16 from Colorado's Fifth Congressional District.

Saturday, U.S. Rep. Ken Kramer presented commemorative bronze medals to families of five of those MIAs.

Kramer said, "We recently had one (a ceremony) at Lowry Air Force Base (Denver) but a number of the recipients could not attend so we decided to combine this ceremony with the Air Force game."

He told the families and friends at the ceremony, "For most Americans, the war in Vietnam has been over for more than a decade. For the families of those still missing in action, the war lingers on.

"I'm sure that all too often it seems to you that your loved ones have been forgotten by the rest of us ... We have not forgotten."

The five families presented with a bronze medal were those of Wolfkeil and Air Force Maj. John W. Goeglein, Air Force Col. Lawrence B. Tatum, Air Force Col. Norman B. Green, and Marine 1st Lt. Robert W. Burns.

Helene Knapp, wife of MIA Air Force Col. Herman L. Knapp, said that in 1978 all MIAs were given the legal status of "presumed finding of death," to ease complications within the family.

Although Mrs. Wolfkeil said she would not be surprised if her husband were still alive, her daughter, Nikki Wolfkeil, said she had no hope.

Miss Wolfkeil said, "It's a matter of emotional survival. You get tired of listening so you go on with your life. It's so hard not to know what's going on."

Mrs. Wolfkeil said that in 1971 she asked the Air Force when they would tell her the truth about her husband. Air Force officials answered, "in 20 years," according to Mrs. Wolfkeil.

"We (United States) did not recognize the fighting at first so we did not recognize how many casualties we had until it was too late," she said.

"I think all people think some MIAs will come back, but not all of them."

Not all shared Mrs. Wolfkeil's optimism.

Mrs. Knapp said, "The years have been too many. I believe if my husband were alive, they (current Southeast Asian governments) would not produce him alive because of the international disgrace they would cause for keeping a man so long."

Robert Knapp was 3 years old when the family received word from the government in 1967 that his father was "shot down."

"I don't remember my father," Knapp said. "I grew up with my mom and she was a good mom and dad but I missed out on having a father."

Knapp said he realized his father's situation when he was 5 years old.

"I don't think he is missing. I think he was killed in action. I hope he was killed in action." Knapp said. "It's been so long that if he were alive he'd probably be a loony. If I had known him, I would feel differently.

"It's been so long without any word, no clue, nothing. It doesn't leave you much."

Knapp said he does not believe there are any MIAs in prisoner-of-war camps in Vietnam, but noted, "Some of them might be still be over there, living there. They were brainwashed, drugged or chemically addicted and might not know what's going on."

Knapp said he also believed his mother had accepted his father's death and said he had one hope for her:

"Maybe she could find someone that would stand up in her eyes to the man she married and loved."

Rep. Ken Kramer honors Springs military families

SW4 10/25/84

By Virginia Kallman
Guest columnist

"October's bright blue weather" turned into a wretched mess last week, forcing the cancellation of many social and civic events and no doubt caused hostesses to have the "vapors" when confronted with large amounts of party food, no guests and the added outrage of a power failure!

•••

In September 1983, Congress authorized a special commemorative medal, to be presented to the families of American servicemen still listed as missing or unaccounted for in Southeast Asia. Subsequently the various branches of the military contacted the families and on Sept. 8 of this year there was a presentation ceremony at Lowry Air Force Base in Denver for the Colorado families. Fifteen families from Colorado Springs were eligible for the medal but only eight could attend the Denver ceremony. last Saturday morning, prior to the Air Force Academy-Brigham Young University football game, U.S. Rep. Ken Kramer invited those families, who had not been able to receive their medals earlier, to attend a luncheon buffet at his office in Colorado Springs. Medals were presented to the following: Steven M. Goeglein, son of Air Force Maj. John W. Goeglein; Hilda M. Green, wife of Air Force Col. Norman M. Green; Stephen Burnes Mason, son of Marine Corps Lt. Robert W. Burnes;; Mary Lee Tatum, wife of Air Force Col. Lawrence B. Tatum, and Anne Wolfkeil, wife of Air Force Col. Wayne B. Wolfkeil.

Those local families who had already received the medals were asked to join the other families for the presentation and among those attending were Jean and Paul Helwig, Carol Helwig, Helene L. Knapp, Robert Knapp, JoAnne Widdis, Ernest and Dorothy McConnaughhay, Penelope Steadman and Karin Steadman.

That afternoon, at the invitation of Lt. Gen. Winfield Scott, superintendent of the Air Force Academy, many of the group attended the football game where they were introduced as honored guests.

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Speaking of the football game, despite less than ideal weather lots of tailgate parties were in evidence in the parking lots. One such group, faithfully in attendance at every home game, has brought new meanig to tailgating...no simple fare for them! From hors d'oeuvres through salad, entree and dessert it is epicurean all the way, with the ladies of the group planning and preparing these tempting feasts. Carolyn and Roy Robinette, Lee Cobb, Naomi McCracken, Dottie and Jess Huggins, Les and Elaine Mellott, John and Leanne Springer, Steve and Tammy McCannon and Michelle Robinette are mainstays of this group of "rain or shine" Air Force fans.

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The Hayden-Hays Gallery at the Broadmoor Hotel will have an opening from 6 to 8:30 p.m. Friday, presenting the recent paintings of Patti Cramer. These paintings will be on display through Nov. 12. Patti Cramer is an extremely well-trained artist, a cartoonist as well as a painter and currently an illustrator with the Denver Post. Her newest paintings are colorful, lighthearted and fun to see. Betty Kane and Terry Hays, owners of the gallery, feel that this young woman is a real comer in the art world.

Airman coming home

Air Force bends rules to bring body from Europe to Springs

By Susan Leonard
Gazette Telegraph

12/18

Top Air Force brass, reportedly stung by public criticism, have bucked official policy and will fly the body of Robert Clouse home to Colorado Springs this week at government expense.

"The Air Force will fly the remains back," according to Maj. James Jannette, a Washington-based public affairs officer for the Air Force. "The decision was just made in the last hour by the Air Force leadership," Jannette said about 2 p.m. MST Tuesday.

Clouse, 23, died of Hodgkin's disease Dec. 12 at an Army hospital in Landstuhl, West Germany. He had been medically retired from the Air Force on Oct. 24, prior to completion of a four-year tour of duty.

The Air Force had refused to pay to fly his body home, saying regulations prohibited it. The State Department offered to bring the body home for $2,300, to be deposited by the family in a Springs bank.

The deceased soldier's father, Henry Clouse of 3094 Pinnacle Drive in Colorado Springs, gained attention by picketing at an Air Force Academy entrance gate over the weekend, and got the ear of U.S. Rep. Ken

See CLOUSE, next page

Clouse: Body to be sent home

From previous page

Kramer, R-Colo.

"Obviously, something like this is not too good for the image of the Air Force," Jim Pinkerman, press secretary to Kramer, said Tuesday. He said Kramer met with Air Force officials on Monday and Tuesday. "and it really took to bat for the family."

Aides to U.S. Sens. Gary Hart and William Armstrong said they also intervened on behalf of Henry Clouse.

The elder Clouse said he was told by one congressional office that the inquiries and media coverage had stirred up the Air Force leadership. "The Air Force Chief of Staff, I believe, said it should be done," Clouse said.

Clouse said he is "glad the Air Force is finally doing what was their responsibility in the first place. I'm glad he's coming home but he should be here already."

Clouse said he will now save $2,000 he borrowed from a family member to bring Robert's body home on a commercial flight. The body originally was to be on a Trans World Airlines flight to Colorado Springs Tuesday, but delays by the funeral home handling the shipment in West Germany prevented that, Clouse said.

The delay was enough time for the Air Force to change its original decision not to bring the body home.

Military regulations are "quite clear" in prohibiting the Air Force from transporting the retired senior airman's body to his burial place, Jannette had said Monday. He said bending the rules could set a precedent that would lead to flying home the remains of thousands of other retired military people now living throughout the world.

On Tuesday, Jannette declined to explain why the Air Force had reversed its decision, or how it could do so in light of the regulations he quoted Monday.

"All I would tell you is the Air Force believes it is in the best interest of the Clouse family, the deceased and the Air Force. The Air Force takes care of its own," he said.

Details on when Clouse's body would be flown home were not available Tuesday. Clouse said he received a call from Air Force Mortuary Services at Tyndall Air Force Base in Florida, informing him that Clouse's body would be flown to Dover Air Force Base in Delaware, possibly by today.

From there, the body will be flown to Peterson Air Force Base in Colorado Springs, possibly arriving there by Thursday, Clouse said.

Jannette said he couldn't confirm those details Tuesday.

Funeral services are tentatively set for 10 a.m. Friday at Evergreen Funeral Home, 3730 E. Fountain Blvd., Clouse said. Burial will be in Evergreen Cemetery.

Kramer opposes closing Fitzsimons

By Jeffrey A. Roberts
Denver Post Correspondent

U.S. Rep. Ken Kramer criticized Defense Secretary Caspar Weinberger on Thursday for putting Fitzsimons Army Medical Hospital in Aurora on a list of military installations to be closed to save money.

"That's pretty much of an about-face after getting assurances (Fitzsimons) would be renovated," Kramer said, referring to a letter he got in November from Army Secretary John Marsh. It said the Army planned to upgrade or rebuild Fitzsimons after 1991.

Sen. Barry Goldwater, R-Ariz., released a list Tuesday, saying Fitzsimons is one of 22 military facilities nationwide that could be shut down to save $700 million a year.

Goldwater, who chairs the Senate Armed Services Committee, said he got the list from Weinberger and thought it meant the facilities could be shut "with little or no adverse effect on our national security."

But Maj. Pete Wyro, a Defense Department spokesman, said Thursday the list was not official. It provided information on bases that could be closed if Congress deemed it necessary to shut any installations.

"We have not proposed any base closures," Wyro said. "We have no formal list."

Kramer wrote Weinberger Wednesday that he is "seriously distressed" by his list. He said he doesn't believe Army statements and plans to scrutinize future discussions of base closures.

"Where there's smoke, there's fire," the Colorado Springs Republican said, adding he thinks the Army has "a real need" for Fitzsimons.

Coloradans seek clarification on Fitzsimons' fate

4-11-85

4-11-8

By ROBERT ENGELMAN
Rocky Mountain News Washington Bureau

WASHINGTON — Contending they've been getting a Pentagon run-around, two Republican Colorado congressmen Wednesday demanded from Defense Secretary Caspar W. Weinberger "a clear and unequivocal statement" on the future of the Fitzsimons Army Medical Center.

"Mr. Secretary, with all due respect, it appears that on this issue the right hand in your office does not know what the left is doing," said a two-page letter from Rep. Kenneth Kramer of Colorado Springs and Rep. Daniel Schaefer of Lakewood.

The Aurora medical center is in Schaefer's district. Kramer, a likely contender for the 1986 Republican Senate nomination, sits on a House Armed Services subcommittee that has jurisdiction over military installations.

FITZSIMONS IS one of 22 facilities on a Defense Department "hit list" provided a month ago to Senate Armed Services chairman Barry Goldwater, R-Ariz. His committee, with a dissent from Colorado Democrat Gary Hart, recently voted not to approve any new spending at the 22 bases.

The Pentagon initially avoided publicly supporting any move to close the bases, but a top official later testified that the move could be a good way to cut defense spending without threatening national security.

Last Thursday, according to the Associated Press, Weinberger told a news conference in San Francisco, "I am in favor of closing all 22 (installations) if we can do it quickly and do it at a far lower cost than what's required now by the existing statutes."

Weinberger estimated that closing Fitzsimons and the other 21 facilities would save $500 million to $600 million a year.

THOSE STATEMENTS surprised Kramer, who had been assured by Army Secretary John O. Marsh in a November letter that the Army is not considering closing this medical center (Fitzsimons). The letter added that the Army planned by 1981 to propose a "total upgrade of Fitzsimons or its replacement in the present area."

A week later, according to Kramer, Assistant Army Secretary John Shannon told him that the Army is conducting a study of Fitzsimons to determine its fate and that the study would take about two years to complete. Last week, Kramer said, another top Pentagon official testified before Kramer's subcommittee that any decision about Fitzsimons would await the result of this study.

"This kind of confusion must stop," Kramer and Schaefer wrote on Wednesday, noting that Weinberger had not responded to earlier Colorado congressional delegation letters asking for clarification on Fitzsimons' status. "We request that your office provide us with a clear and unequivocal statement of current policy regarding the future of Fitzsimons and that it do so without further delay."

DEFENSE DEPARTMENT spokesmen would not comment directly on the Kramer-Schaefer letter Wednesday evening. One read a statement on the base-closing issue, however, noting that the Pentagon had not asked Congress for any funds to close bases in fiscal year 1986.

"We are always examining ways to save money, and the closing of some bases is certainly one possible measure if legislation were passed which would expedite the process," the statement said. "If such legislation were passed we could provide a formal, comprehensive base-closure proposal to the Congress."

Within the Colorado delegation Kramer, Schaefer and Hart have indicated they will fight to keep Fitzsimons open at least until the Army study is completed.

Lawmakers cool to plan studying Fitzsimons role

By JANET DAY 7/18/85
Rocky Mountain News Staff Writer

AURORA — The Army announced Wednesday it will launch a study on whether to remodel, relocate or close Fitzsimons Army Medical Center, but Colorado congressional representatives warned that the study may be just a tool to shut down the repeatedly threatened facility.

Army officials said they will study the future of the 525-acre, 44-year-old base in Aurora before making any commitment for renovations. Fitzsimons requires extensive renovation and construction to make the sprawling facility more cost-effective. It is the only Army medical center in the country not under an improvement plan.

Rep. Pat Schroeder said she is concerned that a study conducted soley by the Army may be based on a preconceived conclusion that the base should be closed.

Last month, Fitzsimons appeared on a list of 22 military bases targeted for closure as part of a budget-cutting move by Sen. Barry Goldwater, R-Ariz., chairman of the Senate Armed Services Committee.

ON TUESDAY, Schroeder asked for a congressional watchdog agency review of the Defense Department as it studies Fitzsimons.

"I don't think anybody feels reassured (by the announcement)," she said.

Rep. Kenneth Kramer said Defense Secretary Caspar Weinberger assured him Wednesday no decision on Fitzsimons' future would be made until results of the study are in.

"I think we've got some time. My feeling is they probably would like to close it," Kramer said.

Army officials said Wednesday the study of Fitzsimons was not related to Goldwater's list. The Defense Department is required to consider all alternatives before appropriating large sums of money to modernize a facility, according to an Army press release.

The study announced Wednesday involves only Fitzsimons, not any of the other bases on Goldwater's list. It will take from six to eight months to complete the study and make recommendations.

"We welcome the study. We knew it was coming, and now it's actually going to start," said Ralph Yoder, Fitzsimons public affairs officer. "We're confident it will prove the strategic necessity of Fitzsimons and the continued care that is so necessary to a 13-state region."

MORE THAN 700,000 retired Army personnel and their families from Chicago to Utah are eligible for treatment at Fitzsimons.

Studies by Fitzsimons show the facility could be renovated for about $150 million. Building a new facility nearby would cost $300 million, Fitzsimons officials said.

An Army Health Services team from San Antonio, Texas, will be brought to Fitzsimons to do the study.

In addition to conducting their own studies, the Army investigators will ask for public comments on the future of Fitzsimons.

News Washington Bureau writer Joan Lowy contributed to this report.

Legislative hearing provides little hope of saving Fitzsimons

6/13/85

By Ann Schmidt
Denver Post Washington Bureau

WASHINGTON — The future of Fitzsimons Army Medical Center in Aurora seemed no brighter Wednesday after a hearing on legislation that would give the Defense Department more leeway in closing military installations it deems too costly to operate.

Dr. Lawrence J. Korb, assistant secretary of defense for manpower, installations and logistics, answered questions from Colorado Rep. Ken Kramer by saying inclusion of Fitzsimons on a closure "hit list" was no accident.

Korb said the Defense Department had planned for some time to take a "very close look at Fitzsimons."

"It is very old. We're thinking about a new hospital at Fort Carson. We need to look at the situation to see if we need both facilities ... it doesn't make sense to put money into a new hospital and fix up the old one too," he said.

He assured Kramer, however, that no action will be taken until a thorough study of the situation was made.

Earlier, Korb told members of the the House Armed Services subcommittee on military installations, of which Kramer is ranking minority member, that the Defense Department supports bills introduced in the Senate by Sen. Phil Gramm, R-Texas, and in the House by Rep. Delbert Latta, R-Ohio. The Gramm measure was passed as an amendment to the defense appropriations bill.

Both would give the department the authority to close large military bases without the approval of Congress, as is required now.

The military is accused of inefficiency, yet its hands are tied when it tries to institute cost effective measures such as closing or consolidating outmoded bases, Korb complained.

Political considerations have stood in the way of such efficiencies, he told the members of the subcommittee. Congressional involvement in the process often results in extended delays and extra costs.

Korb's pleas for a lessening of congressional control received little sympathy from either side of the political aisle.

Kramer said he does not support the legislation, and the situation at Fitzsimons illustrates why.

Despite numerous discussions with Pentagon officials from Defense Secretary Casper Weinberger on down, Kramer said he has not been convinced that the hospital should be closed.

Kramer plans meeting on Fitzsimons closure

GT 8/27/85

U.S. Rep. Ken Kramer, R-Colo., will hold a special town hall meeting in the base theater of Fitzsimons Army Medical Center in Aurora at 6:30 p.m. Wednesday.

Fitzsimons has been included on one list of installations recommended for closure by the Department of Defense.

Kramer's office said the DOD personnel will be at the meeting to hear comment from people in Colorado about the medical center.

Kramer has said a number of times this year that closing of the center would have a direct effect on dependents of active duty military personnel in the state, retired military and veterans, as well as the CHAMPUS patients in the state.

Kramer said all interested persons are invited to attend the hearing and offer their views.

Army sees Fitzsimons decision in year

By JANET DAY 8-29-85
Rocky Mountain News Staff Writer

AURORA — The decision to either renovate or close Fitzsimons Army Medical Center could be made in exactly one year, U.S. Army representatives told more than 1,500 hospital supporters Wednesday night.

The deadline for deciding the fate of the 65-year-old medical facility was set at Aug. 29, 1986, and announced about a month later, Maj. Herbert Coley of Health Service Command said during a "town meeting" about the future of Fitzsimons called by Reps. Dan Schaefer and Tom Tancredo.

The comments of four high-level Army representatives Wednesday marked the first time the military discussed the possibility of closing the hospital.

Throngs of people jammed the base for the session, tying up traffic on East Colfax Avenue. They packed the 1,020-seat Fitzsimons Post Theater and crowded into rooms around the base where television monitors had been set up. Others milled around outside the theater to listen to a broadcast of the testimony.

Prior to the August deadline, an Army team study of the facility should be finished in April, Coley said. Months of internal review will follow before a decision is reached in late August.

Previous "re-alignment" studies have taken several years to complete. It's the fifth such study of whether the aging Fitzsimons facility should be closed. Each study, Army officials said, costs taxpayers about $250,000.

Alternatives being considered are: Upgrading the existing facility, going a step further and modernizing it to include a seven-story addition, replacing the medical center somewhere in the Denver area, closing it and moving operations to Fort Carson, closing Fitzsimons and transfering its duties elsewhere in the country.

Fitzsimons was threatened with closure earlier this year when Senate Armed Services Committee Chairman Sen. Barry Goldwater, R-Ariz., released a "hit list" of 22 facilities targeted for closure.

Department of Defense officials denied the base could be closed until Defense Secretary Caspar Weinberger said in March he would like to see all 22 facilities closed rapidly.

Politicians, civic leaders, hundreds of Fitzsimons patients and employees attended the town meeting to make sure the study takes into consideration the impact closing or moving the hospital would have on the metropolitan area.

"The study has to go beyond the balance sheet," said Aurora Mayor Dennis Champine. "Economics are not the whole story. If it's a waste, I'll help you close the doors, but you have to consider what effect it will have on the community."

Champine and Denver Mayor Federico Peña were among the four panels of government and civic leaders who testified at the hearing.

When Colorado Sen. Jack Fenlon called for a public vote to support keeping the medical center operating, the entire base shook with a resounding "aye" from the audience.

What effect the town meeting may have on the study and ultimate decision may be negligible, Army officials said.

If the Department of Defense is not satisfied with the study or results, it can order the Army to re-examine the alternatives, said Col. James Bazany of Health Services Command.

At any point during the study, higher authority can order more work or a year-long, costly environmental impact study, Bazany said.

The Army's original plan was to start upgrading Fitzsimons in 1990. However, the Department of Defense, reacting to Weinberger and Goldwater's closure lists, ordered the Army to conduct the study on Fitzsimons.

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1,200 people pack meet called to stress need for Fitzsimons

By Jeffrey A. Roberts
Denver Post Staff Writer

AURORA — More than 1,200 people — many retired military veterans — packed a theater at Fitzsimons Army Medical Center Wednesday to testify on the facility's future.

The "special town meeting" was hosted by U.S. Reps. Ken Kramer and Dan Schaefer, both of whom think a U.S. Army review of Fitzsimons will demonstrate the hospital's importance to the military and civilian communities.

Kramer said: "We're here this evening to make sure the Defense Department knows how much Fitz means to people in the Rocky Mountain Region, how much it means to active duty military people and their dependents, how much it means to the retired military community, how much it means to the University of Colorado Medical School ... and how much it means to Aurora, where Fitz is the largest employer."

In March, Fitzsimons appeared on a list of 22 military facilities the Defense Department said could be closed without threatening national security to save more that $500 million a year. About the same time the Pentagon ordered a study of whether Fitzsimons should be modernized, moved or closed.

The study, begun in April by the Army, is expected to be finished by April 1988, Schaefer said.

Fitzsimons, 67 years old, operates inefficiently because it is in disrepair, some officials have said. The main hospital needs as much as $250 million in renovations, repairs and new facilities, said hospital commander Brig. Gen. Philip K. Russell.

8-24-85

Thursday
Aug. 29, 1985
★ Gazette Telegraph

B

Kramer hits study by DOD

By Barry Noreen
Gazette Telegraph

AURORA — Fitzsimons Army Medical Center "has been singled out" for closure by Department of Defense analysts who have "a long way to go" to prove the facility deserves that fate, Rep. Ken Kramer, R-Colo., said Wednesday night.

Kramer, who lives in Colorado Springs, attended a standing-room-only town meeting on the Fitzsimons grounds along with Rep. Dan Schaefer, R-Colo., in whose district the hospital lies.

Kramer promised the gathering, "We're going to try to make the Defense Department understand just how important Fitzsimons is to metropolitan Denver."

Of 22 military facilities originally mentioned for possible closure by DOD, only Fitzsimons warranted a case study, proving, according to Kramer, that the 67-year-old facility has been singled out. As early as 1935, the closure of the hospital had some support, but President Franklin Roosevelt made good on a 1936 campaign promise to keep it open.

During the mid-1970s, another move to close the hospital was met with a petition drive sponsored by the Aurora Chamber of Commerce, which feared losing the substantial local payroll. "It seems to me," Kramer said, "the Army has been through this process twice in the last decade and decided it (the hospital) was viable."

Kramer, speaking to an audience consisting largely of senior citizens, retired and active military personnel, said the burden is on the Department of Defense to ensure how closure will affect various other institutions, including the University of Colorado Medical Center, whose teaching program is intimately connected with the Fitzsimons medical staff.

The current DOD study also must show Fitzsimons cannot make a viable contribution to national security before it can be closed, Kramer said.

Brig. Gen. Philip Russell, the commanding officer at Fitzsimons, stressed that a primary role of the hospital is to "support the Army in time of emergency."

Col. Herbert Coley of the Health Service Command at Fort Sam Houston in San Antonio, Texas, outlined the laternatives being considered in the study:

- Closure, which would include the possible transfer of some Fitzsimons activities to other military hospitals, incuding Fort Carson's. Closure might also mean contracting out some medical services to Denver-area providers.

- Renovation, which is the alternative actively sought by Fitzsimons supporters. A renovation of the current Fitzsimons main building would cost an estimated $55 million, according to estimates provided by the Army; total cost of renovating the entire base would be about $125 million.

5/8/84

VA faces 2nd suspension of loan-guarantee power

WASHINGTON (AP) — The heavy demand for mortgages backed by the Veterans Administration threatens to deplete the agency's loan-guarantee authority for the second time this year, a House subcommittee was told yesterday.

At the same hearing, Rep. Ken Kramer, R-Colo., accused [illegible] stepping up appraisals [illegible] Denver workers to [illegible] a backlog of 4,000 VA-backed applications in Denver and delays of 12 to 16 weeks.

If the high volume of applications continues, the VA's $18.2 billion loan-guarantee authority will expire next month, forcing the agency to stop accepting applications for mortgages, said R.J. Vogel, the VA's benefits director.

Vogel's testimony before the House Veterans Affairs housing and memorial affairs subcommittee followed a Senate voice vote Tuesday night to raise the VA's guarantee authority to $38.9 billion.

The brisk pace of homebuying and mortgage refinancing forced Congress in March to raise the VA's guarantee authority from $11.5 billion to its current level.

The VA, which guaranteed 179,000 new home mortgages last year, expects to back 490,000 when the fiscal year ends Sept. 30, he said. The unprecedented demand for mortgages, along with budget cuts, is also straining the VA's ability to process mortgages and appraise properties quickly, he said.

The Denver office is one of the hardest hit by the flood of applications, Kramer said.

"The problems in the Denver office are particularly acute, since the number of veterans who are seeking to refinance in Colorado is significantly higher than the national average," Kramer said.

Kramer's suggestions include:

- The VA immediately adopting an automatic appraisal system similar to that of the Federal Housing Authority.
- Delegating the appraisal process to qualified lenders.
- Allowing the Government National Mortgage Association, known as Ginnie Mae, to drop its requirement that all loans refinanced under the VA have an appraisal. Ginnie Mae buys VA-backed loans on the secondary market. The VA doesn't require an appraisal.

Kramer also recommended that VA offices be allowed to hire temporary staff members to alleviate the backlog of 4,000 applications in Denver, he said.

If all of Kramer's suggestions were implemented, it could cut in half the time to approve loans, said Al Schneider of the Denver VA office.

Because of 9.5% interest rates, the lowest in 8 years, the office has been averaging a record 434 requests a day for appraisal, he said.

Last week, Rep. Pat Schroeder, D-Colo., suggested that the Denver VA office be allowed to hire extra people to help reduce the backlog.

"Without a doubt, the home loan-guarantee services have been hit hardest and need immediate help," said Rep. Richard Shelby, D-Ala., the subcommittee's chairman.

"Staffing levels have declined to alarming proportions ... and there appears to be a serious deterioration of quality and timeliness of delivery of service to this program," Shelby said.

Rocky Mountain News *real estate editor John Ketchook contributed to this report.*

Rocky Mountain News - 7?
Sun., May 15, 1988, Denver, Colo.

Ginnie Mae puts VA home loans on fast track

JOHN REBCHOOK
City Mountain News Real Estate Editor

Thousands of Coloradans waiting to refinance their mortgages or buy homes with Veterans Administration-backed loans should find the process is faster because of decisions made yesterday.

The Government National Mortgage Association, known as Ginnie Mae, dropped its requirement that all loans refinanced through the VA have a VA certificate of reasonable value, which is the same thing as an appraisal, said Rep. Ken Kramer, R-Colo., yesterday.

That requirement has produced a backlog of 4,000 applications at the Denver VA loan office, causing delays of 12 to 16 weeks.

"The delays in the Denver office were really causing a hardship for a lot of veterans. But the delays should end for a lot of people now and be greatly reduced for others."

Rep. Ken Kramer, R-Colo.

hardships for a lot of veterans," Kramer said. "But the delays should end for a lot of people now and be greatly reduced for others."

Ginnie Mae buys VA-backed loans on the secondary market. Because of the Ginnie Mae requirement, Denver's VA office has been trying to process an average of 434 appraisals each day, even though the VA doesn't require appraisals for refinancing.

Denver's backlog is worse than most cities because of a large number of veterans in the area, and falling mortgage rates have stepped up demand for the loans. But VA officers cannot hire extra staff because of the Gramm-Rudman budget-balancing law.

Also, the Denver office received permission from Washington to pay overtime for a week and is seeking permission to hire more employees, both on a contractural and full-time basis. Kramer said he expect an answer shortly.

Denver VA officials have said that Kramer's proposal could halve processing time.

VA will cut backlog on home loans

By Ann Sommer
Rocky Mountain News

WASHINGTON — Veterans Administration home loans will be a little easier to get in Denver, officials said Wednesday.

What has been a 12-week wait is expected to be reduced by a week or two.

Regulations have been relaxed to help cut down a backlog on loan applications and refinancing requests brought about by lower interest rates.

Don Twitty, regional VA director in Denver, said the federal requirement that all loans being refinanced must have a VA certificate of reasonable value has been dropped. He also had received VA approval to pay overtime through the weekend to VA employees processing the loans.

"We're still 4,000 requests behind — we're working on an average of 12 weeks from date filed to action.

I hope working overtime will cut the wait a week or two," Twitty said.

He has not received approval yet to hire part- or full-time personnel to relieve employees who have quit or taken early retirement during the past year.

"We're down 20 people from where we were in October," Twitty said. "We could use a shot in the arm of 40 people. We now have only 37."

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Canon City Daily 5/22

Campaign Trail

Andy Love, Republican candidate for governor, has challenged Roy Romer, Democrat candidate for governor, to a debate at a place and time of his choosing. Love's only requirement is that the debate be held after the June 7 Republican State Convention.

Gail Schoettler, Democratic candidate for the office of State Treasurer, said she was pleased that the Senate had defeated Concurrent Resolution 4, a constitutional amendment that would have made it very difficult for the State Treasurer to invest and disperse funds. Schoettler is unopposed for the Democratic nomination for state treasurer. Until recently, she served in Gov. Dick Lamm's cabinet as Executive Director of the Department of Personnel.

The Colorado Social Legislation Committee has announced State Sen. Martha Ezzard has been voted Legislator Most Supportive of Human Services Legislation during the 1988 legislative session. Ezzard, a Republican candidate for U.S. Senate was prime sponsor of SB 81 this session, which provides for closer scrutiny of child abuse reporting, tax credit for employer-sponsored child care facilities and creation of a statewide Child Abuse Resource Team.

The El Paso County Young Republicans have set Friday, June 17 as the date for their "Annual Young Republican Reunion." Festivities will begin with a social reception at 6 p.m. followed by dinner at 7 p.m. The event will be held at the Clarion Hotel in Colorado Springs and will include dancing and entertainment by nationally-acclaimed comedian Jeff Valdez, owner of Colorado Springs' Comedy Corner. Tickets are $30 per person and more information can be obtained by writing to the group at 1625 E. Platte Ave., Suite 390, Colorado Springs, 80909. Seating is limited and advance reservations are necessary, said Dave Silver, who can be reached at 548-1909.

Declaring Congress 'must be F.A.I.R. to farmers," U.S. Rep. Ken Kramer called for passage of the Foreign Agriculture Investment Reform Act (F.A.I.R.) to help Colorado farmers beat unfair export policies by other countries.

[redacted] decision [redacted] Administration [redacted] he said [redacted] of cases at the VA's Denver regional office. The Colorado Republican said Clary Rae, the federal firm that backs VA-made loans, has dropped its requirement that all cash refinanced through the VA have a VA certificate of reasonable value. The VA can thus greatly accelerate the loan-making process.

U.S. halts efforts to kill new GI

6/15/86

By Fred Gilkes
Denver Post Staff Writer

Testimony at a recent Denver hearing was "so overwhelmingly in favor" of continuing the new GI Bill that federal officials have halted efforts to kill the program, says U.S. Rep. Pat Schroeder.

"I think the Denver hearing was half of what turned around" Jim Miller, director of the Office of Management and Budget, said the Denver Democrat.

Edwin Dale, an OMB spokesman, confirmed that Miller has decided not to press for repeal of the bill this year.

At the May 27 hearing in Denver, Army and Air Force personnel stressed that the bill — in effect since last July — provides "one of the best programs we have, and it's extremely cost-effective," said Schroeder.

Funds made available

The GI Bill, designed to run until July 1988, makes college education funds available to military personnel.

Schroeder said it is cost-effective because "the military person has to contribute money to the program before he gets anything back."

But in the budget President Reagan sent to Congress in February, he proposed early termination of the new GI Bill as a cost-cutting move.

Schroeder, a member of the House Civil Service Committee, joined U.S. Rep. Tim Wirth, a Boulder Democrat, in vowing to "go back to the mat" if the administration renews its efforts to terminate the bill.

"The administration's decision to call off its attack on the new GI Bill reflects the broad-based support for — and the striking success of — this vital military recruitment tool," said Wirth.

Study cited

Wirth cited a study last year showing that the Army enlisted 17 percent more high-caliber males in the first quarter of the new program than it did for the entire fiscal year of 1984 under the former Veterans Educational Assistance Program.

The Air Force, Wirth said, also reported strong gains — a 38 percent participation rate under the GI Bill, compared with a 6 percent rate under the former program.

In addition to Schroeder and Wirth, full support for the program has been offered by Republicans Reps. Ken Kramer of Colorado Springs and Dan Schaefer of Lakewood.

The GI Bill was authored by Rep. G.V. "Sonny" Montgomery, D-Miss.

Through an aide, Montgomery said: "I believe the administration has finally realized that the program is successful even beyond our expectations.

"Enlistments and re-enlistments are up," he said. "Guard and reserve forces — as well as our other military forces — are benefiting, and we're getting quality recruits. Why should we tamper with that?"

VETERANS RELATED LEGISLATION CO-SPONSORED BY KEN KRAMER- 1981-1986**

HR 1206	Armed Forces Educational Assistance Act
HR 894	A bill in incorporate the United States Sub Veterans of WW II
HR 52	A bill to incorporate the United States Sub Veterans of WW II
HR 4766	A bill to recognize the organization known as United States Submarine Veterans of WW II
H.J. Res. 124	A joint resolution designating August 13 as "National Blinded Veterans Recognition Day
HR 1207	A bill to amend chapter 34 of Title 38, US Code to modify the termination date of veterans eligible for educational assistance provided under such chapter
HR 1918	WW I Veterans Service Pension Act
HR 2007	A bill to amend Title 17 of the US Code to emempt nonprofit veterans organizations and nonprofit fraternal organizations from requirement that certain performance royalties paid to copyright holders
HR 5600	A bill to amend Title 38 US Code to restore certain social security benefits restored by PL 97-35 in the case of survivor veterans dying of service-connected disabilities incurred before Sept. 1, 1981
H.Con. Res 413	A concurrent resolution urging the President to provide as expeditiously as possible for the burial of an unknown soldier from the Vietnam at Arlington Cemetaries Act of 1973
H.J. Res 210	A joint resolution authorizing and requesting the President to designate July 16, 1983, as "National Atomic Veterans' Day"
HR 1914	A bill to amend Title 30 of the US Code to provide for service connected compensation paid to veterans (and their families) who were exposed to nuclear radiation or to toxic chemicals and who are suffering from radiological or chemical disabilities and for other purposes
H.J. Res 258	A joint resolution designating August 3 as "National Paralyzed Veterans Recognition Day"
H.J. Res 570	A joint resolution designating the month of June as "Hire a Vet Month", in recognition of cooperation among the DOL, VA and the nation's business community in developing employment training opportunities for our veterans
HR 1199	A bill to recognize the organization known as Catholic War Veterans of the United States of America, Incorporated
H.J. Res 573	A joint resolution designating August 4, 1984 as "National Legion of Valor Day"
HR 1870	Vietnam Veterans National Medal Act
HR 1959	Veterans Administration Adjudication Procedure and Judicial Review Act

** SPONSOR OF HR 6277 AND HR. 1436

KEN KRAMER SPONSORED/COSPONSORED BILLS- continued

**HR 6277	A bill to recognize the organization known as Retired Enlisted Association, Inc.
HR 1961	Vietnam Veterans Agent Orange Relief Act Veteran's Dioxin and Radiation Exposure Compensation Standards Act Agent Orange and Atomic Veterans' Relief Act
HR 1042	A bill to grant a Federal Charter to the Pearl Harbor Survivors Association
H.Con. Res 69	A concurrent resolution expressing the sense of the Congress that payments by the Veterans' Administration to veterans as compensation for service-connected disabilities should remain exempt from Federal income taxation
HR 3974	A bill to amend Title 10 of the US Code to include the death gratuity payable to survivors of a member of the Armed Forces who dies on active duty an amount equivalent to month's housing allowances
HR 3297	A bill to require the Administrator of the Veterans' Administration to provide for an epidemiological study of the gender-specific effect of exposure to the herbicide known as Agent Orange on female veterans.
HR 585	Veterans' Administration Adjudication Procedure and Judicial Review Act
HR 2588	Korean War Veterans Memorial Act of 1985
**HR 1436	A bill to recognize the organization known as Retired Enlisted Association, Incorporated
H.J. Res 584	A joint resolution designating the week beginning November 9, 1986, as "National Women Veterans' Recognition Week"
H.J. Res 167	A joint resolution to authorize the Armored Monument Committee the United States Armored Association, the World Wars Tank Corps Association, the Veterans of the Battle of the Bulge, the 11th Armored Cavalry Regiment Association, the Tank Destroyer Association the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 16th Armored Division Association and the Council of Armored Division Associations jointly to erect a memorial to the "American Armored Force" on United States Government property in Arlington, VA, and for other purposes

DAV

Motto: "If I cannot speak good of my comrade, I will not speak ill of him."

DISABLED AMERICAN VETERANS

NATIONAL SERVICE and LEGISLATIVE HEADQUARTERS
807 MAINE AVENUE, S.W.
WASHINGTON, D.C. 20024
(202) 554-3501

February 10, 1989

Mr. Kenneth B. Kramer
1400 S. Joyce Street C801
Arlington, VA 22202

Dear Mr. Kramer:

I would like to provide you with an update on our organization's efforts to influence the appointments President Bush will make regarding key positions in his Administration, specifically in the Department of Veterans Affairs.

We met with then President-Elect Bush and asked about several important appointive posts in the new Department. These included the position of Judge, Court of Veterans Appeals. The President-Elect seemed very receptive to our thoughts in this area. However, at that time, he indicated he would rely very heavily on input from Secretary Designate Edward Derwinski in considering candidates for the positions in question.

We are pleased to inform you that we followed up with The Secretary Designate during a meeting on January 31, 1989. At that meeting, I personally presented your name and qualifications to the Secretary Designate, expressing my hopes and those of the DAV's executive staff that your candidacy would receive favorable attention. It was my impression that Mr. Derwinski values our input, and will give our recommendations thorough consideration.

In addition, we have taken the liberty of presenting your name and qualifications to The Honorable Chase Untermeyer, Director of Personnel. Please be assured that we are following all courses of action to ensure full consideration of our suggestions on candidates for appointments in the Bush Administration.

In closing, Mr. Kramer, let me say that it was a pleasure to include your name among those we submitted to our new President. I believe that our organization has assembled a list of very strong candidates for appointments in the Department of Veterans Affairs. In particular, I feel honored that I have had an opportunity to put your name forward in this process.

Please be assured that I or a member of my staff will contact you if there are further developments to report.

Sincerely,

BILLY E. KIRBY
National Commander

OFFICE, ASSISTANT SECRETARY OF THE ARMY (FM)

SUMMARY OF ACTION

TO: EXECUTIVE, OASA(FM)	ACTION OFFICER:	DATE: 23 MAY 1989

SUBJECT: Appeal - Claim of Mr.

SUMMARY OF ACTION: (Include background if appropriate)

The U.S. Army Claims Service forwards for Secretarial action the appeal of the subject claim under the Military Claims Act, 10 U.S.C. 2733, as the amount claimed exceeds $100,000.

The claimant is a civilian employee of an Army Non-Commissioned Officers club who is seeking $500,213.50 for false arrest, and battery resulting in personal injury. The claim arises from an incident occurring in the Federal Republic of Germany in which U.S. Army Military Police (MP) attempted to detain the claimant for questioning when they saw him leaving an "off-limits" establishment. Before they could determine that the claimant was an American civilian employee rather than a soldier, an altercation occurred, in which the claimant and one MP were injured.

The claimant believes that the MP's acted without proper legal authority and attacked him without provocation. The evidence does not sustain the claimant's position and indicates that the MP's acted properly and used reasonable force in defending themselves.

The Commander, U.S. Army Claims Service recommends that you disapprove the claim and deny the appeal. He has submitted a memorandum in support of his recommendation. I concur.

RECOMMENDATIONS:

That you deny the appeal and disapprove the claim of Mr. and sign the memorandum at Red Tab.

OFFICE APPROVAL:

ACTION TAKEN, AUTHORITY, AND DATE:

OSA FORM 5 - 25 APRIL 1957

DEPARTMENT OF THE ARMY
U.S. ARMY CLAIMS SERVICE
OFFICE OF THE JUDGE ADVOCATE GENERAL
FORT GEORGE G. MEADE, MARYLAND 20755-5360

REPLY TO ATTENTION OF:

JUN 28 1989

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Special Claims Branch

Dear Mr.

The Assistant Secretary of the Army (Financial Management), the Secretarial designee to act on your claim against the United States in the amount of $500,213.50 for false arrest and battery as a result of an incident in Boeblingen, Federal Republic of Germany on May 21, 1984, has approved an award of $2500, the amount of this Service's oral offer of settlement. This action is final and conclusive by law under 10 U.S.C. 2735.

Please sign the enclosed settlement agreement and return it to this Service. Once we receive it, we will send a payment voucher to our Finance and Accounting Office, which will send you a check for the above amount. Please advise us if your address has changed.

Sincerely,

Colonel, United States Army
Commanding Officer

Enclosure

OFFICE, ASSISTANT SECRETARY OF THE ARMY (FM)

SUMMARY OF ACTION

To: ASA(FM) 5/26

TO: EXECUTIVE, OASA(FM)	ACTION OFFICER:	DATE: 25 May 89
SUBJECT: Appeal - Claim of Mrs. daughter, Jasmen		on Behalf of her

SUMMARY OF ACTION: (include background if appropriate)

The U.S. Army Claims Service forwards for Secretarial action the appeal from the denial of the subject claim under the Military Claims Act, 10 U.S.C. 2733, as the amount claimed exceeds $100,000.

The claimant seeks $500,000 for head injuries inflicted on her daughter, Jasmen, when she was struck by the husband of a family child care provider certified under the provisions of AR 608-10.

By regulation, claims against certified family child care providers for injuries to children in their care based on the negligence of the providers (or members of their household) are payable. However, claims arising out of an intentional tort, such as assault and battery, are specifically excluded from payment (paragraph 3-11c(2), AR 215-1; paragraph 12-4d, AR 27-20).

The claimant argues the exclusion does not apply in that the government is liable under a negligence theory because the provider was allegedly caring for more children than authorized under AR 608-10. An alternative argument is that the provider negligently entrusted the injured child to her husband who had expressed a dislike for the child and failed to discover the child's injuries until her mother arrived to take her home.

OFFICE, ASSISTANT SECRETARY OF THE ARMY (FM)

SUMMARY OF ACTION

TO: EXECUTIVE, OASA(FM)	ACTION OFFICER:	DATE:
SUBJECT: Appeal - Claim of Mrs. daughter, Jasmen		on Behalf of her

SUMMARY OF ACTION: (include background if appropriate)

The number of children in the provider's care at the time of the incident did not exceed the regulatory limit. There is also no evidence Mrs. had any reason to believe that her husband would strike the child, nor evidence that there was a delay of more than a few minutes in the discovery of the child's injury.

The Commander, U.S. Army Claims Service recommends that you disapprove the claim and deny the appeal. He has submitted a memorandum in support of his recommendation. I concur.

RECOMMENDATIONS:

That you deny the appeal and disapprove the claim of Mrs. on behalf of her daughter, Jasmen and sign the memorandum at Red Tab.

OFFICE APPROVAL:

ACTION TAKEN, AUTHORITY, AND DATE:

DA FORM 5 — 25 APRIL 1957

JUL 18 1989

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Tort Claims Division

SUBJECT: Claim of Jasmine

Dear Mr.

The Assistant Secretary of the Army (Financial Management), Mr. Kenneth Kramer, has received your appeal of the subject claim and requires additional information and argument in order to resolve the case.

Initially, please provide us with a detailed statement from Jasmine's mother concerning her allegations that she was ordered under penalty of disciplinary action to use an Army certified child care provider. As part of this submission, Ms. should specifically detail any alternate family care plan she submitted before she was directed to use a certified child care provider. The full name and position of the officer involved is also requested and a statement whether he or she directed Ms. to use Mrs. as the child care provider.

Second, it is our view that when read together paragraphs 3-6, 3-11c(2), 13-27, 13-28, 13-32.1 and figure 13-1, AR 215-1, and paragraphs 3-4k, 4-7h, 12-3a(2) and 12-4d, AR 27-20 (Enclosure 1), exclude "insurance coverage" for FCC providers for intentional injuries to children resulting from an act of the FCC provider or a member of the provider's household. The Assistant Secretary would like your views on this issue. Specifically, he would like your comments on our position that:

(a) These regulatory provisions provide no basis for paying claims based solely on the intentional torts of a member of the FCC provider's household.

25-740 0 - 90 - 4

(b) The above regulatory provisions incorporate into the FCC insurance program an exclusion for claims "arising out of an assault and battery" that is as broad as the similar exclusion in the Federal Tort Claims Act, (28 U.S.C., Section 2680(h)).

Third, please provide your views on the provisions of paragraph 6-7, AR 608-10 (Enclosure 2), and the significance of Mrs. absence from the apartment at the time that Jasmine was injured. More specifically, was Mrs. improperly absent from the premises under the regulatory language and if so, did this constitute negligence proximately causing Jasmine's injury? For the sake of argument, assume that Mrs. left the apartment at about 1840 (6:40 p.m.) shortly before Ms. arrived.

Finally, to complete the file please provide us with copies of any medical bills incurred to treat Jasmine's injuries, as well as all medical, therapy, developmental or educational records and an evaluation of Jasmine's current medical condition and projected medical needs.

To conclude this matter as expeditiously as possible, please provide a prompt response to this letter. Your response should be sent to us through the U.S. Army Claims Service, Ft. Meade, MD 20755.

Sincerely,

Original Signed

Colonel, U.S. Army
Chief, Tort Claims Division

Enclosure

Services for disadvantaged persons: The American Bar Association in its Comment to Rule 6.1 of its Model Rules of Professional Conduct call: for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Attach a statement describing what you have done to fulfill this responsibility, listing specific instances and the amount of time devoted to each.

Served as director of the Pikes Peak Mental Health Center, El Paso County, Colorado, from 1976-1978. In this capacity, I attended monthly board meetings and visited Center facilities including those for drug and alcohol treatment, emotionally disturbed youth, and community corrections. I was Director of the March of Dimes, El Paso County, Colorado, from 1982 to 1984. While my congressional duties did not permit me to attend board meetings, I was involved on several weekends with special events to either raise funds or provide positive publicity. While a member of the state legislature and U.S. House of Representatives, I visited and was briefed on the following: Colorado State Penitentary; Denver Action program; independent living facilities for the mentally impaired; Colorado Deaf and Blind School; boys' ranch for the emotionally disturbed; halfway house for former prison inmates; numerous nursing homes and senior facilities; and domestic violence and battered women's facilities. I also participated in fundraising events for a number of organizations dedicated to the eradication of specific diseases; was a regular annual fundraiser for the Allied Jewish Federation; presented my "People to People" program (see attachment #4, answer #7) to a number of Hispanic organizations; and actively worked to bring relief to Mexican earthquake victims. Over the years, I have also made modest financial contributions to many of these activities.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: Farley (LAST) John (FIRST) J. III (OTHER)

Present address: 12400 Stretton Lane Bowie (CITY) Maryland (STATE) 20715 (ZIP CODE)

Position to which nominated: Associate Judge U.S. Court of Veterans Appeals Date of nomination: September 6, 1989

Date of birth: 30 (DAY) July (MONTH) 1942 (YEAR) Place of birth: Hackensack, New Jersey

Marital status: Married Full name of spouse: Kathleen Wells Farley

Names and ages of children: Maura P. Farley - 18 Caitlin E. Farley - 6 mos.
Brendan E. Farley - 15
Thomas W. Farley - 13

Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
Holy Cross College Worcester, Mass.	1960-1964	A.B. Econ.	June, 1964
Grad. School of Business Columbia U., New York, NY	1964-1966	M.B.A.	Feb., 1966
School of Law, Hofstra U. Hempstead, NY	1970-1973	J.D.	May, 1973

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Military: Bronze Star Medal with "V" device, 3 Oak Leaf Clusters; Purple Heart Medal with Oak Leaf Cluster; Army Commendation Medal.

Columbia U.: Samual Bronfman Fellow of Democratic Business Enterprise.

Hofstra Law School: Charter Editor-in-Chief, Hofstra Law Review; rank in class: 1; Distinguished Alumni Medal and Commencement Speaker, 1986.

Justice Dept.: Civil Division Special Award, 1980; SES Special Achievement Awards, 1984, 1988

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last five years and any other prior memberships or offices you consider relevant.

	Organization	Office held (if any)	Dates
Bar Memberships:	American Bar Assoc.; Federal Bar Assoc.; Supreme Court; N.Y.; D.C.		
	Nat. Amputation Foundation	Life Member	1969-present
	Disabled American Veterans		
	Senior Executives Association	Member, Bd of Dirs.	1986-1989
	Justice Chapter, SEA	President	1987-1988
	Belair Bath & Tennis Club Bowie, Maryland	Board Member: V.P., Treasurer	1981-1984
	BBT East Partnership (vacation condo: Sea Colony, Bethany, DE)	Partner	1986-present

Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

Marketing trainee, Jello Div., General Foods Corp., White Plains, NY; 2/66-6/66

Interviewer, D.C. Bail Agency, Washington, D.C.; 4/70-6/70

Trial Attorney, Tort Sec., Civil Div., US Dept. of Justice, Wash. D.C.; 9/73-9/78

Asst. Director, Tort Br., Civil Div., US Dept. of Justice, Wash. D.C.; 9/78-10/80

Director, Tort Br., Civil Div., US Dept. of Justice, Washington, D.C.; 10/80-present

Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge

Enlisted: PVT E-1, Basic Training, Fort Jackson, SC, 6/66-8/66

PFC E-2, Advanced Individual Training, Fort Sill, OK, 9/66-11/66

SGT E-5, Artillery OCS, Fort Sill, OK; 11/66-4/67; Honorable Discharge

Commissioned: 2LT O-1, 6th Armored Cav. Regiment, Fort Meade, MD; 5/67-3/68; Duties: Asst. Exec. Off., Howitizer Battery; S-1, Third Squadron.

1LT O-2, 1st Bat., 8th Arty, 25th Infantry Division, Cu Chi, Vietnam, 4/68-1/69; Duties: Forward Observer; Battery Exec. Officer.

CPT O-3, Walter Reed Army Med. Center, Washington, D.C., 1/69-4/70; Retired 4/70

Government experience: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

None

Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

From Liability to Immunity: The Roller Coaster Ride of 1988, The Institute, Vol. 1, No. 1, February 1989

Westfall Fallsi, Action, Vol. 8, No. 9, November 1988

The Fallout From Westfall, Action, Vol. 8, No. 3, March 1988

Senior Executives' Personal Liability, Action, Vol. 7, No. 4, May 1987

Personal Liability of Federal Investigators and Law Enforcement Officers, The Investigators' Journal, Vol. 2, Fall 1986

Federal Tort Liability: Reform in the Wind (Euler and Farley), Federal Bar News & Journal, Vol. 31, No. 1, January 1984

Commencement Address, Hofstra University School of Law, December 21, 1986 (Published in school newspaper)

Outline and Seminar Handout: The Representation and Defense of the Federal Employee by the Department of Justice, Spring 1989; prior versions published by the American Bar Association (National Institute on Municipal Liability) and the Practising Law Institute (Defending the Professional).

Political affiliations and activities:

1. List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

I have not been a member or held any office in a political party during the past 10 years. Financial contributions: $50 in 1982, 1984, 1985, 1986, and 1989 (total: $250) to committee for Maryland State Senator Leo Green; $25 in 1982 and 1985 (total: $50) to committee for Maryland State Delegate Joan Pitkin.

2. List all elective public offices for which you have been a candidate and the month and year of each election involved.

None

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.

Yes

2. State whether you have any plans after completing government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

No such plans.

3. What commitments, if any, have been made to you for employment after you leave Federal service?

None

4. (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

Yes

5. (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

NA

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None

3. Describe any business relationship, dealing, or financial transaction which you have had during the last five years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

4. Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

In 1980, I testified as the designated representative of the Department of Justice before the Senate Judiciary Committee on S. 1858, concerning the defense of certain malpractice and negligence suits arising from National Guard activities and before the House Judiciary Subcommittee on Administrative Law and Governmental Relations concerning a private bill for the relief of James R. Thornwell (Private Law 96-77.)

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

There are no potential conflicts.

Testifying before the Congress:

1. Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes

2. Do you agree to provide such information as is requested by such a committee?

Yes

Farley, John

ADDITIONAL QUESTIONS FOR NOMINEES
TO THE UNITED STATES COURT OF VETERANS APPEALS
(To Be Made Public)

Bar associations: List all bar associations and legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association

Federal Bar Association

District of Columbia Bar Association

New York State Bar Association

Court admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States, March 7, 1977 - present

United States Court of Appeals for the District of Columbia Circuit, October 16, 1975 - present

District of Columbia Court of Appeals, July 8, 1975 - present

United States District Court for the District of Columbia, November 3, 1975 - present

Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, April 8, 1974 - present.

Judicial office: State (chronologically) any judicial offices you have held and whether you were elected or appointed to them and provide a description of the jurisdiction of each such court.

None

Judicial opinions: If you are or have been a judge, attach a statement providing (a) citations for the ten most significant opinions you have written, (b) a short summary of and citations for all appellate opinions either reversing your decision or confirming it with significant criticism of your substantive or procedural rulings, and (c) citations for significant opinions on federal or state constitutional issues, together with citations for any appellate court rulings on your decisions in those cases. (If any of the opinions listed were not officially reported, please provide copies of the opinions.)

Speeches: Attach copies of all speeches you have given on issues involving constitutional law, legal policy, or matters relating to veterans' benefits. If there were press reports of any such speeches and they are readily available to you, please provide them.

Attached: 1. Commencement Address delivered on December 21, 1986, School of Law, Hofstra University, Hempstead, NY, 11550

2. Outline: The Representation and Defense of the Federal Employee by the Department of Justice; this outline served as a handout at the numerous seminars and lectures I presented (over 90 in 1988).

Legal career:

1. Attach a chronological description of your law practice and experience after graduation from law

9/73 - 9/78: Trial Attorney, Tort Section, Civil Division, United States Department of Justice, Washington, D.C. 20530..

9/78 - 9/80: Assistant Director, Torts Branch, Civil Division, United States Department of Justice, Washington, D.C., 20530.

10/80 - present: Director, Torts Branch, Civil Division, United States Department of Justice, Washington, D.C., 20530

2. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

As a trial attorney from 1973 to 1978, I was assigned Federal Tort Claims Act cases. Included were negligence or intentional tort cases arising out of medical malpractice, law enforcement or military activities, and government operations. Increasingly, I also became involved with the defense of federal employees who were personally sued for alleged violations of the Constitution. In 1978, as an Assistant Director, I was assigned responsibility for the representation and defense of individual federal defendants, a responsibility which continues to the present. In 1980, as Tort Branch Director, I was given the additional task of defending the United States in the complex asbestos litigation. I created a specialized unit, recruited, hired and trained over 30 attorneys and, in 1985, turned that assignment over to a new Branch Director. Beginning in 1978, as I became a manager of litigation rather than a litigator, I began an extensive program of educating the federal workforce on personal responsibility and liability. For much of the past decade, I have served on the faculties of the various federal training institutions and have delivered hundreds of presentations on constitutional and common law torts to thousands of federal officials and employees.

3. Describe your typical former clients and the areas, if any, in which you have specialized.

In cases filed under the Federal Tort Claims Act, the client was the United States. In suits against individual federal employees, clients have covered the entire spectrum of the federal workforce: from the President to an FBI agent, from an Attorney General to an NIH epidemiologist. I have specialized in the area of constitutional tort litigation.

4. State whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court has varied over time, describe each such variance, giving dates.

From 1973 to 1978, as a trial attorney, I appeared in court occasionally. Since 1978, I have appeared in court infrequently and not at all since 1983.

5. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel, and identify the courts.

1. Jester v. United States, Civil No. 73-CV-5315, U.S.D.C.,W.D.Mo.; sole counsel; FTCA case against U.S. tried to the court. Upon finding of liability, case settled for $15,000.(1975).

2. Black v. United States, 389 F.Supp. 529 (D.D.C. 1975), reversed 564 F.2d. 531 (D.C.Cir. 1977); associate counsel.

3. Harrigan v. United States, 408 F.Supp. 177 (E.D.Pa. 1976); associate counsel.

Litigation: Attach a statement describing the ten most significant litigated matters which you personally handled. Give the citations of cases that were reported and the docket numbers and dates of those that were not. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case--

(a) the dates of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the names, addresses, and telephone numbers of the individuals who were co-counsel with you and principal counsel for each of the other parties.

Attached; see next 10 pages.

SIGNIFICANT LITIGATION

CASE: Chagnon v. Bell

CITATIONS OR DOCKET NOS & DATES:
468 F. Supp. 927 (D.D.C., 1979); *affirmed* 642 F.2d 1248 (D.C.Cir., 1980); *cert. denied* 453 U.S. 911 (1981).

SUMMARY:
In connection with an espionage investigation, Attorney General Bell authorized an electronic surveillance of suspected agents of a foreign power. Four individuals who were overheard sued the Attorney General, the FBI Director and others for ten million dollars, alleging that their constitutional rights had been violated because a warrant was not secured prior to the initiation of the electronic surveillance.

PARTY REPRESENTED:
Attorney General Griffen B. Bell, FBI Director Clarence M. Kelley, and other federal defendants.

PARTICIPATION:
I prepared and submitted a motion for dismissal or, in the alternative, for summary judgment in the district court. The motion was granted and the plaintiffs appealed. I briefed and argued the case before the Court of Appeals, which affirmed the dismissal.

DISPOSITION:
The case was dismissed on the motion of the defendants; the dismissal was affirmed by the Court of Appeals and the Supreme Court denied certiorari.

NAME OF COURT AND JUDGE(S):
United States District Court for the District of Columbia (Judge John H. Pratt); United States Court of Appeals for the District of Columbia (Judges Robinson, Edwards and Gasch).

CO-COUNSEL:
NONE

COUNSEL FOR OTHERS:
For plaintiffs: Mark H. Lynch, formerly with the ACLU, now with the firm of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C.; phone: 662-6000.

SIGNIFICANT LITIGATION

CASE: Elfego Mendoza Ochoa v. United States

CITATIONS OR DOCKET NOS & DATES:
Civil Action No. 77-78-TUC-MAR, in the U.S.D.C., D.Az; (complaint filed on April 13, 1977)

SUMMARY:
This is a significant case not so much for the issues as for the settlement. The plaintiff was a young Mexican indian who became a quadriplegic when he was shot in the back by a Border Patrol agent while entering the country illegally. (The agent was prosecuted and ultimately convicted by the State of Arizona; see Arizona v. Manypenny, 451 U.S. 232 (1981).) Plaintiff's suit under the Federal Tort Claims Act was the subject of a creative settlement which enabled him to establish a family unit within the United States. The Attorney General used his authority to parole the plaintiff's spouse, three children and mother into the United States. A trust fund in an amount in excess of $500,000 was created such that the proceeds of the trust are used to pay his medical expenses; upon his death, the corpus and any unspent income revert to the U. S. Treasury. A home and a van were purchased and an additional sum was placed in a separate trust for the use of the family's living expenses. The total package was less than one million dollars.

PARTY REPRESENTED:
The United States

PARTICIPATION:
I handled the administrative claim and the following litigation. I negotiated the settlement, drafted the trust agreement, arranged for the parole of the family, and secured both federal and state court approval of the agreement with plaintiff's counsel.

DISPOSITION:
As noted above, the case was settled.

NAME OF COURT AND JUDGE(S):
United States District Court for the District of Arizona (Judge Mary Ann Richey [deceased].

CO-COUNSEL:
None

COUNSEL FOR OTHERS:
For plaintiff: William M. Piatt; Piatt and Livoni, Suite 1150, 2700 North Central Avenue, Phoenix, AZ, 85004; 602-264-0114

SIGNIFICANT LITIGATION

CASE: Monica Malone v. Hall and Shippers Dispatch, Inc., v. United States

CITATIONS OR DOCKET NOS & DATES:
431 F.Supp. 999 (N.D.Oh., 1976), *affirmed* 581 F.2d 582 (6th Cir. 1978).

SUMMARY:
The United States was sued as a third-party defendant. The original case arose out of a tragic accident in which a truck crossed over a barrier and collided head-on with a car, killing the occupants. In the resulting litigation, the trucking company sued the United States, alleging that the efforts of the Equal Employment Opportunity Commission and the Department of Justice to increase the number of minority and Hispanic-surnamed drivers was the cause of the accident.

PARTY REPRESENTED:
The United States.

PARTICIPATION:
I researched, prepared and submitted a motion for dismissal of the third-party complaint and presented the oral argument in the district court. When the motion was granted, the third-party plaintiff appealed. I briefed and argued the case before the 6th Circuit which affirmed the district court.

DISPOSITION:
The case was dismissed and the dismissal was affirmed.

NAME OF COURT AND JUDGE(S):
United States District Court for the District of Columbia (Judge John M. Manos); United States Court of Appeals for the Sixth Circuit (Judges Keith, Edwards and Merrit).

CO-COUNSEL:
None

COUNSEL FOR OTHERS:
For plaintiff: John J. Liber; Spangenberg, Shibley, Traci & Lancione; 1500 National City Bank Building, Cleveland, Ohio, 44114; 216-696-3232
For defendant and third-party plaintiff: Richard T. Reminger, Reminger & Reminger, 113 St. Clair Building, Cleveland, Ohio 44114; 216-687-1311

SIGNIFICANT LITIGATION

CASE: Thornwell v. United States, et al.

CITATIONS OR DOCKET NOS & DATES:
471 F. Supp. 344 (D.D.C., 1979).

SUMMARY:
Plaintiff James Thornwell sued the United States under the Federal Tort Claims Act and individual federal defendants for injuries sustained when he was given LSD without his consent while serving as an enlisted man in the U.S. Army in Germany. The LSD was administered without Mr. Thornwell's knowledge or consent as part of a national security investigation into the possible theft of classified documents.

PARTY REPRESENTED:
The United States and various senior federal officials, including Secretaries of Defense and the Army, senior military officers and civilian employees of the Army.

PARTICIPATION:
I prepared and submitted a motion for dismissal or, in the alternative, for summary judgment in the district court. When that motion was unsuccessful, I worked with opposing counsel and Congressional staff on private relief legislation and I testified on behalf of the Department of Justice and the Carter Administration in support of that legislation. On December 1980, Private Law 96-77, awarding Mr. Thornwell $625,000, was approved.

DISPOSITION:
Upon the passage of the private relief legislation, the case was dismissed.

NAME OF COURT AND JUDGE(S):
United States District Court for the District of Columbia (Judge Charles R. Richey).

CO-COUNSEL:
John L. Euler, Deputy Director, Torts Branch, Civil Division, U.S. Dept. of Justice, Washington, D.C., 20530; 724-7475

COUNSEL FOR OTHERS:
For plaintiff: Randall Speck; Rogovin, Huge & Schiller, 1250 24th Street, N.W., Suite 700, Washington, D.C., 20037; 467-8300

SIGNIFICANT LITIGATION

CASE: Fuller v. Lee

CITATIONS OR DOCKET NOS & DATES:
Civil Action No. 82-0089(C) in the U.S.D.C., W.D.Va (complaint filed on October 29, 1982; decision August 22, 1983); U.S.C.A., 4th Cir, No. 83-1920; decision June 8, 1984); Supreme Court, No. 84-5449; certiorari denied January 21, 1985.)

SUMMARY:
The pro se husband and wife plaintiffs named Solicitor General Rex E. Lee as the mastermind behind an alleged scheme to deprive them of continued employment as law professors. In the course of their complaint and subsequent submissions, plaintiffs alleged that certain decisions made by Mr. Lee as the Solicitor General were made solely to further the conspiracy against them.

PARTY REPRESENTED:
Solicitor General Rex E. Lee

PARTICIPATION:
I was the senior attorney on this case. After initial motions, extensive investigation was conducted both in Washington and at Brigham Young Law School, where affidavits and records of the plaintiffs' activities were secured. I prepared and argued a motion for dismissal which, after extensive argument, was granted. Although the court dismissed the case on procedural grounds, note was also taken of the absence of substantive merit to plaintiffs' charges.

DISPOSITION:
The District Court dismissed the case on the motions of the defendants; the Fourth Circuit affirmed "on the reasoning of the district court", and the Supreme Court denied certiorari.

NAME OF COURT AND JUDGE(S):
United States District Court for the District of Columbia (Judge James H. Michael, Jr.); United States Court of Appeals for the Fourth Circuit (Judges Phillips, Murnaghan and Haynsworth).

CO-COUNSEL:
John L. Euler, Deputy Director, Torts Branch, Civil Division, U.S. Dept. of Justice, Washington, D.C., 20530; 724-7475

COUNSEL FOR OTHERS:
Plaintiffs represented themselves; their last known address is P.O. Box 7814, Charlottesville, VA 22906
For co-defendant Parker: Luisa Lancetti; Wilkinson, Barker, Knauer & Quinn, 1735 New York Avenue, N.W., Suite 600, Washington, D.C., 20006; 783-4141

SIGNIFICANT LITIGATION

CASE: Horvat v. United States

CITATIONS OR DOCKET NOS & DATES:
Civil Action No. 74-3282 in the U.S.D.C., E.D.Pa., (complaint filed on December 23, 1974).

SUMMARY:
In this Federal Tort Claims Act case, the plaintiff, a paralyzed veteran, alleged that a bi-lateral ureteroileostomy performed at the Philadelphia Veterans Administration Hospital constituted medical malpractice. At the time of the surgery, there was a split in the medical community concerning the wisdom of the procedure and whether its use was the type of "conservative" treatment which should be given to paraplegics and quadriplegics. This medical dispute gave rise to a number of similar cases (see, e.g., Harrigan v. United States, 408 F.Supp. 177 (E.D.Pa., 1976).

PARTY REPRESENTED:
The United States

PARTICIPATION:
I handled this litigation personally, which involved heavy discovery, extensive medical expert review, numerous depositions and arguments. Ultimately, with the assistance of the court, a settlement was reached.

DISPOSITION:
As noted above, the case was settled for $90,000.

NAME OF COURT AND JUDGE(S):
United States District Court for the Eastern District of Pennsylvania (Judge Edward R. Becker, now on the U.S. Court of Appeals for the Third Circuit; 215-597-9642).

CO-COUNSEL:
None

COUNSEL FOR OTHERS:
For plaintiff: Jerome H. Ellis, Cedarbrook Apartments, Building One Annex, Wyncote, PA, 19094; 215-884-5151.

SIGNIFICANT LITIGATION

CASE: Saltany v. Reagan

CITATIONS OR DOCKET NOS & DATES:
702 F.Supp. 319 (D.D.C. 1988)

SUMMARY:
This case was filed by a former Attorney General on behalf of Libyans injured or killed during the April 1986 bombing. The defendants included the President and the senior military and civilian officials of the Department of Defense. The plaintiffs argued that the bombing was a violation of both domestic and international law and they sought damages in the millions of dollars.

PARTY REPRESENTED:
President Ronald W. Reagan; Caspar W. Weinberger; William J. Crowe; Bernard W. Rogers; Frank B. Kelso; Charles A. Gabriel

PARTICIPATION:
In view of the importance of this case to the issue of potential personal liability for extra-territorial official actions. I participated extensively in the development of the defense plan. I assigned primary responsibility to a senior attorney, edited and reviewed the briefs and coordinated our efforts with client agencies.

DISPOSITION:
On December 23, 1988, our motion on behalf of the individual defendants was granted. The case is now on appeal.

NAME OF COURT AND JUDGE(S):
United States District Court for the District of Columbia (Judge Thomas Penfield Jackson).

CO-COUNSEL:
Larry L. Gregg, Senior Trial Counsel, Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C. 20530; 724-7056.

COUNSEL FOR OTHERS:
For plaintiffs: Ramsey Clark, 36 East 12th Street, New York, New York 10003; (202) 475-3232
For co-defendant United Kingdom and Prime Minister Thatcher: Mark R. Joelson; Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. 20036; (202) 467-7240

SIGNIFICANT LITIGATION

CASE: Forsyth v. Kleindienst

CITATIONS OR DOCKET NOS & DATES:
447 F.Supp. 192 (E.D.Pa. 1978); 599 F.2d 1203 (3d Cir. 1979); 551 F.Supp. 1247 (E.D.Pa. (1982); 700 F.2d 104 (3d Cir. 1983); 729 F.2d 267 (3d Cir. 1984); 472 U.S. 511 (1985)

SUMMARY:
This case sought money damages from former Attorney General John N. Mitchell and two FBI agents for a warrantless telephone surveillance in connection with a national security investigation. The plaintiffs alleged that the failure to obtain a warrant violated their constitutional rights.

PARTY REPRESENTED:
John N. Mitchell; E. Davis Porter; Albert Cooper

PARTICIPATION:
As Assistant Director and then as Branch Director I had the supervisory responsibility for this litigation. When the case was transferred to my review in 1978, I worked with the trial attorneys to develop and implement the defense strategy, edited and reviewed the motions and memoranda submitted in furtherance of that strategy. When trial was set for the district court, appellate review was immediately sought. I continued to guide the overall strategy which ultimately prevailed: in Mitchell v. Forsyth, the Supreme Court ruled that the Attorney General was immune. Of significance to our litigation, the Court also ruled that the denial of immunity to federal officials is immediately appealable.

DISPOSITION:
The Supreme Court remanded with direction that the case be dismissed.

NAME OF COURT AND JUDGES:
United States District Court for the Eastern District of Pennsylvania (Judge Raymond J. Broderick); United States Court of Appeals for the Third Circuit (Judges Hunter, Weis, Markey; Weis, Sloviter, Becker; Higginbotham, Weis, Sloviter); Supreme Court.

CO-COUNSEL:
Larry L. Gregg (724-7056); Gordon W. Daiger (724-7132); Senior Trial Counsel, Torts Branch, Civil Division, U. S. Department of Justice, Washington, D. C. 20530

COUNSEL FOR OTHERS:
David Rudovsky; Cairys & Rudovsky, Suite 500, 924 Cherry Street Philadelphia, PA 19107; (215) 925-4400

SIGNIFICANT LITIGATION

CASE: Halperin v. Kissinger

CITATIONS OR DOCKET NOS & DATES:
401 F.Supp. 272 (D.D.C. 1975); 424 F.Supp. 838 (D.D.C. 1976); 434 F. Supp. 1193 (D.D.C., 1977); 606 F.2d 1192 (D.C.Cir., 1979); 452 U.S. 713 (1981); 542 F.Supp. 829 (D.D.C., 1982); 578 F.Supp. 231 (D.D.C. 1984); 807 F.2d 180 (D.C. Cir., 1986).

SUMMARY:
This case sought money damages from former President Nixon, former Attorney General Mitchell, former presidential advisors Kissinger, Haldeman and Erlichman, and other federal officials for a warrantless 21 month wiretap of a National Security Council staff member. The plaintiff alleges that the wiretap violated his statutory and Fourth Amendment rights; the defendants have raised and litigated their entitlement to various official and personal immunities.

PARTY REPRESENTED:
Richard M. Nixon; John N. Mitchell; Henry A. Kissinger; et al.

PARTICIPATION:
The case was assigned to my supervision and review in 1978, where it remains. As Assistant Director and then as Branch Director I participated in the development of the defensive strategy with the attorneys assigned to the case, coordination with client agencies and participated in individual client conferences. I edited and reviewed the numerous briefs filed in the various courts.

DISPOSITION:
The case is pending upon our motion for summary judgment on behalf of the remaining defendants.

NAME OF COURT AND JUDGES:
United States District Court for the District of Columbia (Judges John Lewis Smith and John H. Pratt); United States Court of Appeals for the District of Columbia Circuit (Wright, Robinson, Gesell; Scalia, Mikva, Robinson); Supreme Court

CO-COUNSEL:
Larry L. Gregg (724-7056); R. Joseph Sher (724-6337); Senior Trial Counsel, Torts Branch, Civil Division, U. S. Department of Justice, Washington, D. C. 20530

COUNSEL FOR OTHERS:
For plaintiffs: Mark H. Lynch; Covington & Burling, 1201 Pennsylvania Avenue, N. W. , Washington, D.C.; 662-6000

SIGNIFICANT LITIGATION

CASE: Salisbury v. United States

CITATIONS OR DOCKET NOS & DATES:
Civil Action No. 80-909, in the U.S.D.C., for D.C. (complaint filed April 10, 1980); 690 F.2d 966 (D.C. Cir., 1982).

SUMMARY:
The plaintiff, foreign correspondent for the New York Times, alleged that his international communications were acquired by the National Security Agency and sought damages under the Federal Tort Claims Act and documentation under the Freedom of Information Act. The district court concluded that national security concerns militated against the action proceeding and dismissed the case.

PARTY REPRESENTED:
The United States and the National Security Agency

PARTICIPATION:
The case was assigned to my supervision and review during the proceedings in the district court. In view of the importance of the issue, i.e., the ability of a plaintiff to maintain a lawsuit involving classified information, I worked daily with the attorney assigned to the case, participated in the drafting of the ultimately successful motions for dismissal, and coordinated our delicate response with the client agency.

DISPOSITION:
The case was dismissed without the United States having to answer the complaint; the Court of Appeals affirmed.

NAME OF COURT AND JUDGES:
United States District Court for the District of Columbia (Judge John H. Pratt); United States Court of Appeals for the District of Columbia Circuit (Robinson, McGowan, Northrup).

CO-COUNSEL:
Larry L. Gregg, Senior Trial Counsel, Torts Branch, Civil Division, U. S. Department of Justice, Washington, D. C. 20530; 724-7056

COUNSEL FOR OTHERS:
For plaintiff: Mark H. Lynch; Covington & Burling, 1201 Pennsylvania Avenue, N. W. , Washington, D.C.; 662-6000

Legal activities: Attach a statement describing the ten most significant legal activities you have pursued (other than the litigated matters referred to above). Describe the nature of your participation, but please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

STATEMENT OF TEN MOST SIGNIFICANT LEGAL ACTIVITIES

1. Attorney General's Advocacy Institute: I have been associated with the Advocacy Institute virtually since its inception. I attended one of the first Civil Advocacy courses as a student in 1975 and have served as an instructor of trial advocacy or as a substantive lecturer at most of the civil courses since that time. I have delivered presentations on expert witnesses, settlement techniques, ethics and the representation and defense of federal employees.

2. Federal Judicial Center: Because of a deepening concern as to the threat of personal liability, I participated in numerous seminars, workshops and conferences for federal judges and judicial officers at the request of the Federal Judicial Center. During 1987 and 1988, I had the opportunity to address virtually all of the U. S. Magistrates, most of the Bankruptcy Judges and the workshops of district and appellate judges from the First, Third, Fifth, Sixth and Eleventh Circuits.

3. Civil Division Representation Committee: I was an original member of this committee which was formed in 1978 and which continues as the institutional memory of the Department of Justice with respect to the policy and practice of representing federal employees who are sued personally for official conduct. The committee considers requests for representation in difficult or novel cases and makes recommendations to the appropriate decision-maker based upon precedents and Department policies.

4. Department Review Committee: The DRC was established pursuant to 28 C.F.R. § 17.135 and assigned the responsibility within the Department of Justice for resolving all issues dealing with national security information, the implementation and administration of Executive Order 12356, and reviewing denials to requests under FOIA based upon classification. Because of the need to coordinate national security information policy with on-going civil litigation, I was chosen to serve on the DRC as the first Civil Division representative, originally as an observer and later as a voting member.

5. Federal Executive Institute: During 1987 and 1988, I delivered lectures on the personal responsibility and legal liability of senior federal executives to those attending the prestigious four-week course at FEI, Charlottesville, Virginia.

6. OPM Executive Seminar Centers: In 1980, I began a program of educating mid-level and senior federal managers which continues to the present. At the Kings Point, NY, Oak Ridge, TN., and Denver, CO., centers, I delivered perhaps one hundred half-day presentations during the Executive Development Seminars and the Management Development Seminars. The purposes of the sessions were to educate the federal managers, and through them the federal workforce, on Department of Justice representation policy and practice, the standards of responsibility imposed by the Constitution, federal statutes and regulations, and the potential for personal liability.

7. Asbestos Defense Seminar: The United States became a major target in the massive asbestos litigation when it was sued in numerous jurisdictions throughout the country in cases which became my responsibility. In order to take control of and coordinate the national defensive effort, I designed and ran a three-day seminar in May, 1982 for over 100 agency counsel and Assistant United States Attorneys. The program included presentations by senior administration officials, medical and scientific experts and counsel for the asbestos industry.

8. "Westfall" Seminar: The January 1988 decision by the Supreme Court in Westfall v. Erwin, 484 U.S. 292 (1988), drastically diminished the amount of protection from personal liability which had been available to the federal workforce. In order to provide guidance on the new law resulting from this decision and to establish and coordinate a nationwide response, I initiated, planned and supervised a three-day seminar in June 1988 which was attended by over 200 Assistant United States Attorneys, Department of Justice attorneys and client agency counsel. A 300-page practice manual, prepared under my direction and supervision, was distributed to the attendees.

9. Continuing Legal Education: I have served as a faculty member or presenter at numerous programs designed to provide continuing legal education to the bar. Included were programs of the Georgetown University Law Center ("The Art and Problems of Trial Practice;" 1980); Practising Law Institute ("Defending the Professional;" 1982); the Federal Bar Association and the Washington Bar Association (1981); the D.C. Bar and the National Law Center (1989); the Legal Education Institute (1978 - 1989).

10. American Bar Association National Institute: In November 1987, I was a faculty member at the National Institute entitled Municipal Liability: The Search for the Deep Pocket. I also contributed a chapter to the course book which was distributed to the attendees by the ABA.

Outside employment: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, please provide details.

None

Party affiliation: State (a) your current political party affiliation and the place and date it was established, and (b) if you have in the past registered as being with a different party (or as an independent if not now registered as an independent), the place and inclusive dates of such registration.

I am not now affiliated with any political party and have not been since I registered to vote in Prince Georges County, Maryland, on or before April 23, 1976 (the date on the Voter's Information Card.) I believe that I may have first registered in 1963 in Nassau County, N.Y. as a Democrat; that affiliation was changed in Nassau County to Republican in 1971 or 1972.

Memberships in certain organizations: The American Bar Association's Commentary to Canon 2 of its Code of Judicial Conduct states, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Do you currently belong, or have you belonged, to any organization which discriminates in this manner -- through either formal membership requirements or the practical implementation of membership policies? If so (a) list all such organizations of which you are or were a member, (b) provide the dates of your memberships, and (c) describe in each case the efforts you made to try to change the organization's discriminatory policies or practices.

I do not belong, and have not belonged, to any such organization.

Services for disadvantaged persons: The American Bar Association in its Comment to Rule 6.1 of its Model Rules of Professional Conduct calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Attach a statement describing what you have done to fulfill this responsibility, listing specific instances and the amount of time devoted to each.

My entire legal career, both as a member of the bar, and earlier as a defense counsel during military service, has been as a public servant. The nature of my duties at the Department of Justice and the provisions of 28 C.F.R. § 45-735-9 have limited my ability to provide what might be considered traditional pro bono services. However, in furtherance of my responsibility for representing and defending all federal employees, I have striven to ensure that disadvantaged federal employees, particularly those in the lower pay grades who find themselves named as defendants, benefit from the same high quality representation that is received by senior officials. Moreover, by means of literally hundreds of seminars, lectures and presentations to federal employees of all levels and financial means, I have provided "assistance in coping with the web of statutes, rules and regulations" which defines and limits their official conduct and which governs their personal liability. Finally, I have provided service to the bar through presentations for the American Bar Association; the District of Columbia Bar Association; and the Federal Bar Association.

Selection process:

Has anyone involved in the process of selecting you as a nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.

COMMENCEMENT EXERCISES

SCHOOL OF LAW, HOFSTRA UNIVERSITY

DECEMBER 21, 1986

COMMENCEMENT ADDRESS

BY JOHN J. FARLEY, III

Chairman Zarb, Members of the Board of Trustees, President Shuart, Provost Hammer, Reverend Clergy, Dean Schmertz, Members of the Faculty, Guests and Fellow Alumni of the School of Law of Hofstra University.

Thank you Dean Schmertz for those very kind words. I wish my parents had heard them. My father would have wondered who you were talking about but my mother would have believed every word.

It is indeed a privilege to deliver the commencement address. I was somewhat concerned when Dean Schmertz asked me because this is December 21st, already the longest night of the year, but I became excited when I realized that many of my former professors would be in this captive audience. For a change they have to sit quietly and listen to me without being able to criticize or question. No Socratic method tonight! What an opportunity! What sweet revenge!

But I will resist the temptation to make this night longer just to hold my former professors hostage. Actually, I am glad that so many of them are here because it gives me the opportunity to express my gratitude to them:

- To Professor Malachy Mahon, for challenging me to link my future with that of an infant law school with great plans. I have never regretted accepting the challenge.

- To Professor Gene Wypyski, whose love for books was contagious; if Abraham Lincoln was right when he said "My best

friend is the man who'll get me a book I ain't read," then Gene, who built our great law library, is truly the best friend of us all.

- To Professor Burt Agata, who proved that there was more to our Constitution than the Gilbert's Outline Series; he sparked an interest which has lead to 13 years of constitutional litigation.

- To Professor Stu Rabinowitz, who opened the door to the federal court system. He dragged me, kicking and screaming, into an arena which I have never left.

- To Dean Eric Schmertz, who raised the haggle to an art form; who brought dignity to disputes. I took every course he taught and I learned from his teaching and his practice that it was possible to respect and even like our opponents while we were attacking the positions of our opponent. For me, this has civilized the adversarial process of litigation.

To these and to the other members of this great faculty, I am grateful.

Among the other captives in this audience tonight are my wife, Kathleen, and my children, Maura, Brendan and Thomas. I would be woefully remiss if I did not tell you of my love for them, my gratitude for their constant support and my pride in them. My wife, a teacher and counsellor, shared my law school experience and is my ideal, the source of my strength and my conscience. Despite the 5 hour drive up from Washington today, our children are the joy of their parents' hearts. It is with

happy wonder that we are watching them grow in wisdom and grace. It is my fervent hope that any professional distinction which might come my way has not been, and will not be, at their expense.

That concludes the commercial message; we return you now to our regularly scheduled program: the commencement

I would like to speak for a brief moment to the guests of the graduates. In his Second Inaugural Address, Abraham Lincoln spoke of his desire "to care for him who shall have borne the battle . . ." Today, of course, an enlightened President Lincoln would no doubt have said " him/her" or avoided the gender problem all together by speaking "to those who shall have borne the battle" but the point, dear parents, spouses, children, relatives and friends of the graduates, is that, just like my wife during her time of seige at the Hofstra Law School, you are the ones who have truly borne the brunt of this battle of law school. In addition to financial sacrifices, you have supported your new lawyer through times of confusion, anxiety, questioning and self-doubt. You endured silently and with great patience the incomprehensible mutterings of your lawyer-to-be which sounded something like: "res ipsa loquitur," "quantum meruit," "caveat emptor," and my favorite, "quare clausum fregit." You respectfully pretended to be interested in the rules which your new graduate took all-too-seriously: the rule in Shelly's case, the rule of stare decisis, and the rule against perpetuities.

You have nobly borne the battle and deserve congratulations, but I am going to give you something even more rare and precious, something which you are not likely to get again, even from your new lawyer. I am going to give you free legal advice! This graduation ceremony does not end your obligation of support because there is yet another battle to be fought: the battle of the bar examination. Contrary to what you will soon hear, the world is not likely to end soon; bar examiners are, in fact, legitimate children of respectable parents; and bar review courses are not the modern equivalent of the rack. With your support, your new graduate will pass the exam and enter a profession of service, for that is what the practice of law is all about: service. Congratulations! You have borne and won the battle!

Now I would like to congratulate my fellow alumni of the School of Law of Hofstra University. Your first opportunity as alumni will be to join the alumni association; your dues will be collected as you leave here tonight.

My congratulations to you are heartfelt because I have a very real stake in you and your futures. Not a week goes by that I do not speak or teach or lecture somewhere in the nation and I am introduced as a graduate of the Hofstra University School of Law. In the early days, the name of Hofstra Law School was met either with a blank stare or some reference to the old Bill Cosby routine on the Temple-Hofstra football game. But in recent years, the Hofstra Law School has taken the giant strides

outlined earlier by Dean Schmertz and by their accomplishments your predecessors, our fellow alumni, have helped to spread the reputation of Hofstra far and wide. As you advance in your careers, you too will increase the prestige of the law school and its graduates, including me, will benefit. Therefore, I thank you in advance and congratulate you on your graduation.

Your graduation occurs during a season of celebration: Christmas is just four days away and Hanukkah begins in five. This is a night of celebration in a season of celebration and I would like to speak of yet another celebration - a national one, the 200th birthday of the Constitution of the United States. Professor Agata first introduced me to the Constitution; it also should be noted that he introduced me to John Dean so I'll leave you to draw your own conclusions. My familiarity with the Constitution grew as I was assigned to testify before Congress and to litigate constitutional issues first as a Department of Justice trial attorney, then as supervisor and now as a director in the arena in which Professor Leon Friedman has so ably served: constitutional tort litigation. Now that Congress has created a Bicentennial Commission of distinguished Americans to lead the Constitutional birthday party, you will hear and read much over the next few years about our heritage. I would like to share with you a few thoughts to set the stage for our national bicentennial celebration.

The first thought is one of amazement that the Constitution was ever written, much less that it was ratified and endures to

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this day. The process began out of a failure in Annapolis, Maryland. The Continental Congress called for the states to meet in September 1786 in Annapolis to discuss serious trade and commerce problems under the Articles of Confederation, but only 5 states sent delegates. Maryland - the host - did not even bother to send a delegation, so the sessions were held in a local tavern. By the way, we live near Annapolis and my wife and I commemorate this event by paying frequent respectful visits to the Annapolis taverns. The only accomplishment of the meeting was a recommendation that another meeting be called.

Invitations went out to all states to send delegates to Philadelphia in May 1787. The express purpose of the meeting was solely to make changes in the Articles of Confederation to correct problems with trade, not to write a Constitution. When the meeting began, only 7 of the 13 states were represented. Other representatives trickled in but Rhode Island never did send a delegate; Massachusetts, New Hampshire and Connecticut were jointly represented by one man, Rufus King. Of the 74 representatives designated by the states, only 55 showed up.

The meeting lasted 17 weeks through the summer, from May to September in hot, steamy Philadelphia. Remember the old joke: first prize is a week in Philadelphia; second prize is two weeks in Philadelphia; imagine what you have to do to get seventeen weeks. These sessions were filled with dissention, disagreement and heated debate. (The reports remind me of the early days of the Hofstra Law Review.) In the end, only 42 delegates remained

and only 39 signed the Constitution; 3 specifically refused. After much debate and some close votes, the Constitution was ratified. George Washington described the result as a miracle; I think the description fits.

Now, 200 years later, this experiment, this miracle has become the longest operating written Constitution in the history of the world. Let me put this in perspective: of approximately 160 constitutions in force today, only 14 pre-date World War II. My second thought, therefore, is one of wonder at the adaptability of our Constitution. It has provided the framework for our development from a revolutionary wilderness nation of farmers and tradesmen into a world power of awesome complexity and strength.

The lead comment in this weeks' New Yorker appears to argue that our Constitution is outmoded, that it is of little or no value in this age of nuclear proliferation and terrorism, that it does not adequately provide for our national security. The comment concludes, however, that this venerable document is just as vital, just as vibrant today as it was 200 years ago. Indeed, the comment opines that our three biggest postwar blunders (McCarthyism; Vietnam and Watergate; and the Iran/Contra matter) would have been avoided if the Constitution had been followed.

As Justice John Marshall said, the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Let me show you how this

200 year old document has been adapted to a modern crisis of human affairs: the traffic jam.

Article I, Section 6, provides that: "Senators and Representatives . . . shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same;..." When you consider the difficulties involved in traveling up and down the eastern seaboard 200 years ago, the reason for the clause is obvious. State delegations had to free from detention or arrest by other states because of the potential impact upon the important work of the Legislative Branch. In modern times, this clause has taken on new meaning. In Virginia, just outside Washington, D. C., there is a phenomenon known as "HOV Lanes." During rush-hour, these express traffic lanes can only be used by HOV's - highly occupied vehicles or car pools. Senator Roger Jepsen of Iowa was stopped on a number of occasions by Virginia state police while driving alone in the HOV lanes. Each time a state trooper pulled him over, he identified himself as a United States Senator traveling to or from a session of the Senate and demanded that the Constitutional command be honored; in each case, the trooper let him go. So, it should be noted, did the people of Iowa; he was defeated in 1984.

My third thought is a messy one. It is said that there are two things which should not be watched on a full stomach: sausage-making and legislation. I have not seen sausage being made, but having watched lawmaking at close range, I do not want

to visit a sausage factory. The government created in Philadelphia is not a pretty sight; it is not a model of efficiency. And yet, that is precisely what the signers envisioned: controlled chaos. Having just rebelled from a strong central government, the drafters wanted to avoid authoritarian rule. They took great care to divide the power of government between three branches and to build in controls to prevent the accumulation of too much power by any one branch. The Legislative power to enact laws was checked by the Executive power of veto which was, in turn, checked by the Legislative override which was itself checked by Judicial oversight; the Senate's power of advise and consent checks Executive and Judicial appointments and the power of impeachment checks their performance; only Congress can declare war but the President is the Commander-in-Chief. In the past few months we have witnessed these checks in operation: a federal judge was impeached; a Presidential veto was overridden by Congress; and today there are multiple Legislative and Executive investigations presently being conducted of White House operations. These "checks and balances" create a constant friction, an internal tension which limits the power of government just as they were intended to.

The Bill of Rights, enacted in 1789, puts external controls upon governmental power. The government cannot conduct unreasonable searches or seizures, imprison without trial, take property without due process of law and just compensation, compel a citizen to incriminate himself, discriminate based upon race,

creed or national origin. Citizens are entitled to a jury and counsel; they are free to assemble, to speak, to write, to practice a religion of their choice. We see the strength these limits everyday as we witness the spectacle of senior military officers frustrating the power of the government by invoking their individual Constitutional rights.

The tension is obvious, palpable and sometimes unpopular; the controls from within - the checks and balances - and without - the Bill of Rights - make government often appear inefficient and ineffective. Yet that is what the draftsmen intended. While Professor Leon Friedman and I may litigate the limits of these controls, usually from opposite sides, I think we would both agree that this experiment in tension, this miracle works and works well.

My final thought is again prompted by the words of John Marshall: "The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will." The real cause for celebration is not the 200th birthday of the Constitution but the will of the American people. To show you what I mean, lets review together some Constitutional words and ideals:

"All power . . . belongs to the people." [Article 2.]

"Citizens . . . are equal before the law, without distinction of origin, social or property status, race

or nationality, sex, education, language, attitude to religion, . . .

The equal rights of citizens . . . are guaranteed . . ." [Article 34.]

"Women and men have equal rights. . ."[Article 35.]

"Citizens . . . have the right to compensation for damage resulting from unlawful actions by state organisations . . . or by officials in the performance of their duties." [Article 58.]

These are the inspiring words of the Constitution, but it is not the Constitution of the United States; it is the Constitution of the Union of Soviet Socialist Republics which was adopted by the Supreme Soviet of the U.S.S.R. on October 7, 1977.

My point, dear friends, is that words may be inspirational and ideals noble but, to paraphrase Justice Marshall, our Constitution ". . . is the creature of [our] will and [it] lives only by [our] will." It is the American spirit, our will, our faith in the ideals of the Constitution that are true causes for our national celebration.

And so tonight, there is much to celebrate. We are poised to begin once again religious ceremonies ancient in heritage and rich in tradition. We honor these law graduates who have chosen to dedicate themselves to the profession of law in a nation founded on law. And we celebrate the will of generations of Americans, past, present and to come, on the occasion of the 200th birthday of our written Constitution.

Congratulations to the graduates, Happy Hanukkah, Merry Christmas, and Happy 200th Birthday to us all.

THE REPRESENTATION AND DEFENSE OF THE FEDERAL EMPLOYEE BY THE DEPARTMENT OF JUSTICE

Spring 1989

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Appendix

I. Historical Introduction.

A. Common Law Tort Suits:

1. Suits for common law torts (negligence, assault and battery, defamation, etc.) against present or former federal officials personally for money damages based upon official conduct, while not unknown, were rare. Those common law tort suits that were actually filed generally did not survive the doctrine of absolute immunity. Barr v. Matteo, 360 U.S. 564 (1959).

2. In January 1988, in Westfall v. Erwin, 484 U.S. 292 (1988), the Supreme Court severely limited the protection of Barr by changing the test for absolute immunity in common law tort suits. By requiring proof of the exercise of "sufficient discretion," the Court greatly increased the twin risks to federal employees of protracted litigation and personal liability.

3. Congress reacted swiftly by passing the Federal Employees Liability Reform and Tort Compensation Act of 1988. The Act effectively overruled Westfall by amending the Federal Tort Claims Act (FTCA) to provide that common law tort suits cannot be brought against federal employees if they were acting within the scope of their federal employment. The exclusive remedy, if any, would be against the United States under the FTCA.

B. Constitutional Tort Suits:

1. In 1971, the Supreme Court held for the first time that an alleged violation of the Constitution could serve as the basis for a suit for money damages personally against federal officials. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). In a dissenting opinion, Justice Blackmun accurately predicted that the decision would lead to an "avalanche" of suits against federal employees.

2. The Federal Employees Liability Reform and Tort Compensation Act of 1988 expressly does not protect federal employees from suits arising under the Constitution.

3. Over 5,000 suits are presently pending against present or former federal officials. While there have only been 44 known adverse verdicts, of which only 6 have been paid to date by the individual defendants, suits continue to be filed against present or former federal officials for money damages. Approximately 80 requests for representation are received by the Torts Branch each month, with 40 percent historically arising out of law enforcement activities.

II. Representation of Present and Former Federal Employees.

Pursuant to 28 U.S.C. §§ 516-519, the Attorney General and the Department of Justice are responsible for attending to the interests of the United States in litigation. 28 U.S.C. § 517 vests in the Attorney General the authority to "attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interests of the United States."

A. Official Capacity Representation:

The Department of Justice represents federal officials sued in their official capacities for injunctions, mandamus and other forms of equitable relief in connection with their duties. Since any equitable relief, in fact and in effect, would be directed against the government, the interests of the United States are involved and the U.S. Attorney appears on behalf of the official. Personal assets are not at risk in an official capacity suit and no formal request for personal representation is required.

B. Individual Capacity Representation:

The Department of Justice advances the interests of the United States when it represents its employees who are personally sued for actions taken within the scope of their employment. Booth v. Fletcher, 101 F.2d 676 (D.C. Cir. 1938), cert. denied, 307 U.S. 628 (1939); Barr v. Matteo, 360 U.S. 564, 591 (1959)(Brennan, J., dissenting). Representation is provided "in order to protect the interest of the Government, not the individual interests of the employee. The Justice Department clearly has no obligation to a particular employee, ..." Ryan v. United States, 227 Ct.Cl. 711, 713-714 (1981) (emphasis in original).

1. Although not an obligation, it has been the practice and policy of the Department of Justice

to represent federal employees who are personally sued for money damages in their individual capacities based upon actions undertaken in their official capacities. Policy guidelines are published at 28 C.F.R. §§ 50.15 and 50.16. A copy of the guidelines is attached at the end of this outline.

2. There are two criteria which must be met in order for the Department of Justice to represent a federal employee/defendant:

   a. SCOPE OF EMPLOYMENT. The employee's actions giving rise to the suit must reasonably appear to have been performed within the scope of his federal employment.

   b. INTEREST OF THE UNITED STATES. It must be determined that providing representation is in the interest of the United States. It is generally in the interest of the United States to represent employees in order to establish the legality of the way they perform their duties and to promote vigorous performance of duty by relieving employees of the burden of defending suits.

3. The Department of Justice is responsible for making the "scope" and "interest" determinations after benefiting from agency recommendations. Since the Executive Branch is responsible for determining the interests of the United States in litigation, representation decisions are not subject to Judicial Branch review under the doctrine of separation of powers. See Falkowski v. EEOC, 783 F.2d 252 (D.C. Cir. 1986); cert. denied, 478 U.S. 1014 (1986).

4. As a practical matter, Department of Justice representation is available in most civil cases and in some state criminal actions against federal employees (particularly where the Supremacy Clause of the Constitution is a defense). It is not available to federal employees in federal criminal proceedings, in agency disciplinary inquiries, or in de minimus cases such as traffic citations.

C. Procedure.

1. Department of Justice representation is neither automatic nor compulsory; federal employees are free to retain counsel of their choice at their

own expense. If Justice representation is desired, the employee must submit a written request for representation through the employing agency which, in turn, forwards the request to the Department of Justice with its recommendation and all supporting factual material.

2. The Civil Division or, if appropriate, another litigating division makes the necessary determinations on scope of employment and interest of the United States. If the determinations are in the affirmative, a Department attorney or the United States Attorney in whose district the litigation is filed is authorized and requested to provide representation to the individual defendants.

3. If representation is denied, the employing agency and/or the individual defendant are advised as soon as possible so that counsel may be retained privately by the defendant.

D. Limitations.

Department of Justice representation is limited by the authority and the responsibility of the Attorney General and the Department to "attend to the interests of the United States" in litigation. (28 U.S.C. § 517). A copy of Form DOJ-399, which contains the limitations and conditions of Department of Justice representation, is attached at the end of this outline.

1. Federal employee defendants may retain private counsel at their own expense to defend their interests at any time; they are not required to request or accept Justice representation.

2. A Department of Justice attorney is required to represent the United States as well as the individual and to assert all appropriate legal positions and defenses which would establish the non-liability of the United States; Department of Justice attorneys will not assert any legal position or defense which is not in the interest of the United States, even if it might be in the interest of the individual defendant.

3. The Department will neither institute suit on behalf of federal employees nor represent them in affirmative claims (counter-claims, cross-claims, third-party actions, etc.) for money damages. Such actions would be in the personal interest of

the employee--not the interest of the United States--and must be pursued by private counsel at the expense of the employee.

E. Payment of An Adverse Judgment.

1. Regardless of whether representation is provided by the Department of Justice, a federal employee remains personally responsible for the satisfaction of a judgment entered solely against the employee; there is no right to compel indemnification from the United States or an agency thereof in the event of an adverse judgment. The exceptions to this rule are extremely limited; 26 U.S.C. § 7423 (judgments resulting from the collection of revenues); 28 U.S.C. § 2006 (execution against a revenue officer); 10 U.S.C. §§ 1054 (Department of Defense attorneys), 1089 (DOD medical personnel); 38 U.S.C. § 4116 (VA medical personnel); 42 U.S.C. § 233) (Public Health medical personnel); 49 U.S.C. § 1354(e) (Federal Aviation Administration).

2. As a matter of policy, the Department of Justice <u>may</u> indemnify Justice employees for adverse judgments in appropriate cases as determined by the Attorney General. 28 C.F.R. § 50.15(c). In rare cases and "exceptional circumstances" as determined by the Attorney General the Department will consider settlement or indemnification prior to judgment. Indemnification would be from salary and expense funds appropriated to the employing agency. Requests for indemnification should be submitted by the defendant to the agency head who will submit a recommended disposition to the appropriate Assistant Attorney General who will, in turn, make a recommendation to the Attorney General.

3. The Small Business Administration (13 C.F.R. § 114.112), the Department of Health and Human Services (45 C.F.R. § 36.1), and NASA (14 C.F.R. § 1261; 53 Fed. Reg. 27481 - 27483) have adopted similar policies.

4. Although other agencies may not have adopted a formal policy, consideration may be given to indemnification on a case-by-case basis.

F. Private Counsel.

1. Where conflicts in the factual or legal positions of a number of defendants make representation by a single attorney impossible, private counsel may be retained at Government expense to represent the individual defendants, subject to the availability of funds. See 28 C.F.R. § 50.16.

2. The Department of Justice's Appropriations Act for 1989, P.L. 100-459, provides that the Department "may enter into reimbursable agreements with other Federal Government agencies or components within the Department of Justice to pay expenses of private counsel to defend Federal Government employees sued for actions while performing their official duties." In view of the chronic shortage of funds, the Department will now "make every effort" to secure reimbursment from the agency which employs the individual defendant(s).

III. Criminal Proceedings.

A. Federal Criminal Proceedings

That federal officials are not immune from federal criminal prosecution was demonstrated in stark terms on February 23, 1989. Three senior Army managers at Aberdeen Proving Ground were convicted in United States District Court in Baltimore for violating the Resource Conservation and Recovery Act (RCRA).

B. State Criminal Proceedings

1. Federal employees are immune from state criminal process and proceedings pursuant to the Supremacy Clause of the Constitution if the actions were necessary and proper to carry out federal responsibilities. See In re Neagle, 135 U.S. 1 (1890); Johnson v. Maryland, 254 U.S. 51 (1920); Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977); Commonwealth of Kentucky v. Long, 837 F.2d 727 (6th Cir.1988) (immunity applies even if there was a mistake in judgment or a "botched operation".)

2. The right of a federal defendant to remove a state criminal proceeding to federal court may have been limited by the holding of the Supreme Court in Mesa v. California, ___ U.S.___, 109 S. Ct. 959 (1989): "Federal officer removal under 28 U.S.C. §1442(a) must be predicated upon averment of a federal defense."

IV. Exclusive Remedy Provisions.

A. The Federal Tort Claims Act:

1. Prior to the passage of the Federal Employees Liability Reform and Tort Compensation Act of 1988 in October 1988, the remedy against the United States under the Federal Tort Claims Act was the exclusive remedy in only a few, specifically defined cases. Only government drivers (28 U.S.C. § 2679); most government medical personnel (10 U.S.C. § 1089; 22 U.S.C. § 817; 38 U.S.C. § 4116; and 42 U.S.C. § 233); and Department of Defense lawyers (10 U.S.C. § 1054) were protected by the exclusive remedy provisions.

2. The Act extends that protection to all federal employees, including those employed in the Legislative and the Judicial Branches. The sole test for the application of the exclusive remedy provision of 28 U.S.C. § 2679(b)(1) as amended is whether the employee was "acting within the scope of his office or employment;" if sole, then the exclusive remedy available to a potential plaintiff is a suit against the United States. Simply stated, federal employees cannot be sued for common law torts.

3. 28 U.S.C. § 2676 provides that a judgment (or settlement) against the United States under the FTCA bars entry of a judgment against the federal employee whose conduct gave rise to the action. Thus, a tort judgment against the United States immunizes federal employees from liability, even for constitutional torts or punitive damages. Serra v. Pichardo, 786 F.2d 237 (6th Cir. 1986), cert. denied, 107 S. Ct. 103 (1986); Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987).

B. Title VII Suits Alleging Discrimination.

1. The exclusive remedy for discrimination based upon age, sex, race, creed, color, handicap, National origin in the civilian federal employment sector is a Title VII action which seeks relief from the agency head in his or her official capacity. Brown v. General Services Administration, 425 U.S. 820 (1976).

2. Some circuits have held that Title VII is an exclusive remedy only for discrimination. A

federal employee was able to sue her supervisor for the torts of battery and intentional infliction of emotional distress due to unwanted touching, following and telephoning her at home because the alleged actions were beyond the scope of employment and therefore beyond the reach of Title VII. Otto v. Heckler, 781 F.2d 754 (9th Cir., 1986), modified 802 F.2d 337 (1986); see also Arnold v. U. S., 816 F.2d 1306 (9th Cir., 1987); Owens v. United States, 822 F.2d 408 (3rd Cir., 1987.)

3. Title VII is an exclusive remedy, but only where it applies. The Supreme Court has held that where Title VII is inapplicable (e.g., employees of the Legislative Branch), the supervisor may be personally sued. Davis v. Passman, 442 U.S. 228 (1979).

C. Federal Employment and Personnel Practices.

1. In Bush v. Lucas, 462 U.S. 367 (1983), the Supreme Court held that there is no cause of action for alleged retaliatory, even unconstitutional, personnel practices by supervisors. The exclusive remedy lies in the administrative procedures which exist under the civil service regulations and statutes.

2. However, subsequent to Bush, a number of courts of appeal permitted suit if the plaintiff convinced the court there was no adequate administrative remedy for the alleged injuries. See Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986)(allowing a probationary employee to sue supervisors); McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987)(judgment of $110,000 against personnel specialist for destroying records of investigation of job selection allegedly motivated by favoritism and discrimination).

3. In June 1988, the Supreme Court vacated the opinions in both Kotarski and McIntosh (sub nom. Turner v. McIntosh), 108 S. Ct. 2861, and remanded with instructions that the cases be reconsidered in light of Schweiker v. Chilicky, 108 S. Ct 2460 (1988). The D.C. Circuit did not wait; on September 30, 1988, the en banc Court unanimously held in Spagnola v. Mathis, 859 F.2d 223 (D. C. Cir., 1988) that "'special factors' preclude the creation of a Bivens remedy for civil service employees and applicants who advance

constitutional challenges to federal personnel actions." Other circuits have followed, thus restoring the letter and the spirit of Bush v. Lucas: the federal courts are not the proper forum to resolve personnel problems. McIntosh v. Turner, 861 F.2d 524 (8th Cir. 1988); Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989).

V. Immunity Defenses to Civil Damage Actions.

Depending upon the individual sued and the activity in question, federal employees may have an immunity defense available which should be asserted as soon as strategy, tactics and the record permit. The term Official Immunity encompasses both absolute immunity and qualified immunity. "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." Imbler v. Pachtman, 424 U.S. 409, 419 n. 13 (1976).

A. Absolute Immunity for Common Law Torts:

1. Prior to Westfall v. Erwin, 484 U.S. 292 (1988), absolute immunity generally was available if the employee acted within the "outer perimeter" of federal employment. Barr v. Matteo, 360 U.S. 564 (1959). See also General Electric Co. v. United States, 813 F.2d 1273 (4th Cir. 1987); Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425 (D.C. Cir. 1987); Poolman v. Nelson, 802 F.2d 304 (8th Cir. 1986).

2. In Westfall, on January 13, 1988, the Supreme Court clarified the standards for absolute immunity and significantly decreased the protection available to federal employees against liability for common law torts such as negligence, assault, battery, defamation, etc.

3. In October 1988, Congress reacted to what was described as the most serious problem facing the federal workforce by passing the Federal Employees Liabilty Reform and Tort Compensation Act of 1988. The Act legislatively overrules Westfall and provides that the FTCA shall be the exclusive remedy for common law torts committed by federal employees when acting within the scope of their office or employment. Thus, the question of absolute immunity in defense of common law tort

suits no longer arises because, as a matter of law, no such suit can be brought against a federal employee.

4. Litigation is pending on the constitutionality of the Act and its retroactive application to pending cases. In addition, there are challenges to the position of the Department of Justice that "scope of employment" certifications cannot be reviewed.

B.- Absolute Immunity in Constitutional Tort Suits:

1. As a general rule, absolute immunity is not a defense to suits alleging constitutional violations "subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." Butz, 438 U.S. at 507.

2. Specific or "Functional" Absolute Immunities:

a. Presidents are absolutely immune from civil damages liability for official acts. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

b. Judges are absolutely immune from suit and liability for actions undertaken in a judicial capacity. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Stump v. Sparkman, 435 U.S. 349 (1978); Cleavinger v. Saxner, 474 U.S. 193 (1985). However, judicial immunity does not apply to suits arising out of non-judicial acts of judges such as those involving administrative, executive or legislative functions. In Forrester v. White, ___U.S.___, 108 S. Ct. 538 (56 U.S.L.W. 4067, January 12, 1988), the Supreme Court ruled that a state judge could be sued by a probation officer who alleged that her firing resulted from sex discrimination.

1.) Judicial immunity does not protect a judge from personally having to pay an award of attorneys fees under 42 U.S.C. § 1988 upon entry of an adverse equitable judgment under 42 U.S.C. § 1983 or 1985. Pulliam v. Allen, 466 U.S. 522 (1984).

2.) Judicial immunity also extends to Executive Branch employees who perform adjudicatory functions. Butz v. Economou, 438 U.S. 478, 514 (1978). NOTE: Despite the quasi-adjudicatory nature of the work of

school boards and prison disciplinary committees, members are not absolutely immune. Cleavinger v. Saxner, 474 U.S. 193 (1985).

C. Prosecutors are absolutely immune from suits arising out of their role as judicial advocates. Yaselli v. Goff, 275 U.S. 503 (1927); Imbler v. Pachtman, 424 U.S. 409 (1976). This immunity may not extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer. . . ." Imbler, 424 U.S. at 430-431. Agency officials performing functions analogous to those of a prosecutor are also absolutely immune. Butz, 438 U.S. at 515. Grand jurors are also absolutely immune. Imbler, 424 U.S. at 423, n. 20.

D. A line of cases had held that law enforcement officers who drafted affidavits were protected by immunity if a judicial officer found that the affidavits established probable cause and issued search or arrest warrants. The Supreme Court ended that line in Malley v. Briggs, 475 U.S. 335 (1986). Despite the determination by a state judge that probable cause existed, the majority held that there would be no immunity if a "reasonably well-trained officer" would have known that the affidavits were not sufficient to establish probable cause.

E. Witnesses, just like judges and prosecutors, are integral parts of the judicial process and are absolutely immune from suits resulting from testimony. Briscoe v. LaHue, 460 U.S. 325 (1983).

F. Legislators are absolutely immune for activities embraced by the Speech or Debate Clause of the Constitution. Tenney v. Brandhove, 341 U.S. 367 (1951). This immunity does not extend to press releases. Hutchinson v. Proxmire, 443 U.S. 111 (1979).

1.) The Supreme Court has not yet ruled whether the Speech or Debate Clause protects members of Congress from suits alleging discrimination because Davis v. Passman, 442 U.S. 228 (1979), was settled prior to a decision on that issue.

3.) Congressional staff are not immune. Benford v. American Broadcasting Companies,

Inc., 502 F. Supp. 1148 (D. Md. 1980), aff'd, 661 F.2d 917 (4th Cir.), cert. denied sub nom. Holton v. Benford, 454 U.S. 1060 (1981).

G. Members of the military are immune from suit by other members of the military for injuries occurring incident to military service. Feres v. United States, 340 U.S. 135 (1950); United States v. Johnson, 481 U.S. ___, 107 S. Ct. 2063 (1987). The Supreme Court has held that this rule applies even if there are allegations of constitutional violations. Chappell v. Wallace, 462 U.S. 296 (1983), United States v. Stanley, 481 U.S. ___, 107 S. Ct. 3054 (1987).

H. National security. The Supreme Court has held that the Attorney General is not absolutely immune when performing national security functions. Mitchell v. Forsyth, 472 U.S. 511 (1985) (per White, J., joined by three Justices).

D. Qualified Immunity for Constitutional Torts:

While qualified immunity is an affirmative defense, the Supreme Court has stressed that it is an immunity from suit and not just an immunity from liability. Most courts hold that the burden is on the defendant affirmatively to establish entitlement to the defense; if the burden is met, the defendant is entitled to judgment.

1. The defendant has the burden of pleading qualified immunity. Gomez v. Toledo, 446 U.S. 635 (1980).

2. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court held that an official's entitlement to qualified immunity is established if it is proved by objective standards that there was no violation of "clearly established" constitutional guarantees. Moreover, the Supreme Court strongly guided the district courts that: "Until this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. Even if the court determines that the constitutional right at issue was clearly established, the defendant can still prevail if he shows "extra-ordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard. . . ." 457 U.S. at 819.

3. In Davis v. Scherer, 468 U.S. 183 (1984), the Supreme Court held that Harlow qualified immunity

remained available even when the conduct of the official also violated a state administrative regulation. Thus, if the right is not "clearly established" as a matter of constitutional law, the official is immune even if he violated administrative or statutory direction.

4. In Anderson v. Creighton, 481 U.S. ___, 107 S. Ct. 3034 (1987), the Supreme Court held that the test for qualified immunity is objective: whether a reasonable officer could have believed that the conduct was lawful. If so, then summary judgment is proper. ". . . it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . those officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable."

E. **Appeal:**

Like absolute immunity, qualified immunity is designed to protect federal officials from insubstantial lawsuits and from the burdens of having to go to trial. It is "an immunity from suit rather than a mere defense to liability." (Emphasis in original) and the Supreme Court has held that denials of qualified immunity are immediately appealable. Mitchell v. Forsyth, 472 U.S. 511 (1985).

ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on the job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, JR.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman, Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman, Civil Service Commission.

ARTHUR E. FLEMMING,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 28th day of August 1978.

RICHARD ALBRECHT,
General Counsel, Department of the Treasury.

Section 18. Citations. The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

"Section ——, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR —— (August 25, 1978)."

The short form citation is:

"Section ——, U.G.E.S.P. (1978); 43 FR —— (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60-3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR ——, (August 25, 1978); 29 CFR Part 1607, section 6A."

ELEANOR HOLMES NORTON,
Chair, Equal Employment Opportunity Commission.

ALAN K. CAMPBELL,
Chairman, Civil Service Commission.

RAY MARSHALL,
Secretary of Labor.

GRIFFIN B. BELL,
Attorney General.

[Order No. 668-76, 41 FR 51735, Nov. 23, 1976, as amended at 43 FR 38200, Aug. 25, 1978]

§ 50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil and Congressional proceedings, and in state criminal proceedings in which Federal employees are sued or subpoenaed in their individual capacities.

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM ' '9.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expense.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is

deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the U.S. Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the employee may apply for such indemnification from his employing agency upon the entry of an adverse verdict, judgment, or other monetary award;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraph (a) (6), (9) and (10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

(c)(1) The Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General or his designee.

(2) The Department of Justice may settle or compromise a personal damages claim against a Department of Justice employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Attorney General or his designee.

(3) Absent exceptional circumstances as determined by the Attorney General or his designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award.

(4) The Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee. The employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal if on appeal, to the head of his employing component, who shall thereupon submit to the appropriate Assistant Attorney General, in a timely manner, a recommended disposition of the request. Where appropriate, the Assistant Attorney General shall seek the views of the U.S. Attorney; in all such cases the Civil Division shall be consulted. The Assistant Attorney General shall forward the request, the employing component's recommendation, and the Assistant Attorney General's recommendation to the Attorney General for decision.

(5) Any payment under this section either to indemnify a Department of Justice employee or to settle a personal damages claim shall be contingent upon the availability of appropriated funds of the employing component of the Department of Justice.

[Order No. 970-82, 47 FR 8173, Feb. 25, 1982, as amended at Order No. 1139-86, 51 FR 27022, July 28, 1986]

§ 50.16 Representation of Federal employees by private counsel at Federal expense.

(a) Representation by private counsel at federal expense is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a)(6), (9) and (10), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel under this section, the Civil Division shall be consulted before the retention is undertaken.

(c) Where private counsel is provided, the following procedures shall apply:

(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

[Order No. 970-82, 47 FR 8174, Feb. 25, 1982]

§ 50.17 Ex parte communications in informal rulemaking proceedings.

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553:

(a) A general prohibition applicable to all offices, boards, bureaus and divisions of the Department of Justice against the receipt of private, ex parte oral or written communications is undesirable, because it would deprive the Department of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow, and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

(b) All written communications from outside the Department addressed to the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, and bureaus, and divisions or their personnel participating in the decision, should be placed promptly in a file available for public inspection.

(c) All oral communications from outside the Department of significant information or argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, bureaus, and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in a file available for public inspection.

(d) The Department may properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552.

(e) The Department may conclude that restrictions on ex parte communications in particular rulemaking proceedings are necessitated by considerations of fairness or for other reasons.

[Order No. 891-79, 43 FR 42397, Sept. 20, 1978]

§ 50.18 Criminal division review under the Foreign Corrupt Practices Act of 1977.

Although the Department of Justice is not authorized to give advisory opinions to private parties, the Criminal Division is willing, in certain circumstances, to review proposed conduct and state its present enforcement intention under sections 103 and 104 of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1, 78dd-2, but not including section 102 of the Foreign Corrupt Practices Act, 15 U.S.C. 78m(b)(2), (3). The conditions for such review are set forth below:

(a) A request for a Foreign Corrupt Practices Act (FCPA) review letter must be submitted in writing in an original and five copies to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Review Group. The mailing address is P.O. Box 7814, Benjamin Franklin Station, Washington, D.C. 20044. The address for hand-delivery is 8th floor, Federal Triangle Building, 315 9th Street, NW., Washington, D.C. 20530.

(b) The entire transaction which is the subject of the review request must be an actual transaction but need not involve only proposed conduct. The Criminal Division will not consider a request, however, unless that portion of the transaction for which clearance is sought involves only proposed conduct.

(c) The Criminal Division will consider a review request only when sub-

U.S. Department of Justice

Acknowledgment of Conditions of Department Representation

Name of Case	) District
	) Court Number
DOJ Contact Attorney At Main Justice	) DOJ Number
	) Date Filed
Name and Address of Person To Be Represented	

This acknowledgment must be executed as part of your request for legal representation by the Department of Justice. The acknowledgment is designed to advise you of the extent and nature of legal representation that can be provided you by Department of Justice attorneys. Your signature at the end of the acknowledgment indicates your understanding of and agreement to such representation.

The acknowledgment may be submitted either at the time you request representation or immediately after you have been notified that the Department has approved your pending request.

If you agree to accept Justice Department representation pursuant to the provisions set forth below, please execute the signature block at the end of the acknowledgment and return to the person furnishing you the acknowledgment. If the Department has advised that it will provide you with representation, the Department's representation will be considered to have taken effect on the date it was first authorized provided that you have signed and returned this acknowledgment. If this acknowledgment is being submitted as part of your request for representation, you will be advised of the Department's decision promptly after it has been made.

Your representation will be governed by the Attorney General's Representation Guidelines set forth in 28 C.F.R. §§ 50.15 and 50.16. A copy will be furnished upon request.

Representation is provided under the Guidelines upon a determination that it is in the interest of the United States to do so. Additionally, if you are being sued for conduct in your capacity as a current or former federal employee or official, representation is provided if it reasonably appears that such conduct was taken within the scope of your federal employment. The following representation provisions constitute the more significant features of the Representation Guidelines.

(1) *Attorney-Client Communication Privilege*

All written or oral communications between yourself and your assigned Justice Department lawyer will be protected by the traditional attorney-client privilege.

(2) *Claims Against The United States*

Your Justice Department attorney will not assert on your behalf any claim you may have against the United States in this case; nor will he or she assert any claim you might have against other federal employees.

(3) *Counterclaims*

As a general policy, your Department of Justice attorney can only undertake to defend you. He or she will not assert an affirmative claim on your behalf against the plaintiff or anyone else. If you strongly believe that such a claim should be asserted, your normal recourse would be for you to hire a private attorney at your personal expense to press that claim. In the rare instance when an affirmative claim would further not only your defense, but also the interests of the United States, the Department will consider pressing the claim.

(4) *Conflicts With The United States*

If there is a legal argument which should be made in your defense, but which conflicts with a legal position taken by the United States, or any of its agencies, in this or another case, your Department of Justice attorney will not make the argument. You will be advised of this fact so that you may assess available options. Correspondingly, should you ever have questions in this regard, you should take the opportunity to discuss them with your assigned Justice Department attorney.

(5) *Conflicts With Co-Defendants*

If there is a material conflict of interest between you and one of your individually-sued co-defendants, whether factual or legal in nature, your Department of Justice attorney will advise you of this fact so that you may assess

available options. Correspondingly, should you ever become aware of such conflicts, you should immediately bring them to the attention of your Justice Department attorney. Normally, in such cases, it will not be possible for your Justice Department lawyer to continue representing you and other co-defendants having mutually conflicting interests.

(6) *Defending Co-Defendants*

If your Justice Department attorney is representing other defendants in your case in addition to yourself, including the United States or an agency, the Department attorney may elect to press available defenses that could result in the dismissal of a co-defendant before yourself.

(7) *Appeals*

If the judgment of the court is in your favor and the losing plaintiff appeals, representation will continue throughout the appellate stage in this case. In the event of an adverse judgment against you, the Solicitor General of the United States will determine whether an appeal by your Justice Department attorney would be in the interest of the United States. If not, you will be promptly advised in order to discuss available options.

(8) *Retention of Private Counsel*

In certain limited circumstances where a Department of Justice attorney can no longer represent you, such as those circumstances discussed in paragraphs (4), (5) and (7), the Department may elect in its discretion to provide you with a private attorney at government expense. You will be so advised if such circumstances arise.

(9) *Paying Adverse Judgments*

In the event of an adverse money judgment entered against you in this matter, or against you and other individually-sued employees, you may be personally responsible for the payment of the judgment; there is no general right to indemnification from the United States. However, if the United States is a proper defendant and there is a final judgment entered jointly against you and the United States, the United States would pay the judgment. By statute, the United States cannot be held liable for punitive damages (damages awarded to punish a defendant). Therefore, you would be personally responsible in the unlikely event punitive damages are assessed.

I have read the foregoing conditions of Justice Department representation and accept their terms.

(Signature) (Date)

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

SEP -8 1989

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by John J. Farley, III, who has been nominated by President Bush to be an Associate Judge on the United States Court of Veterans Appeals.

We have reviewed the report and have also obtained advice from the Court of Veterans Appeals concerning any possible conflict in light of the Court's functions and the nominee's proposed duties. Based thereon, we believe that Mr. Farley is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Frank Q. Nebeker by L.D.
Frank Q. Nebeker
Director

Enclosure

RESPONSES TO PRE-HEARING QUESTIONS SUBMITTED BY SENATOR ALAN CRANSTON TO COURT OF VETERANS APPEALS ASSOCIATE JUDGE-DESIGNATE JOHN J. FARLEY, III

Question 1.: What is your concept of the nature and extent of the Federal Government's obligations to the Nation's veterans and their dependents and survivors?

Response to Question 1.: Our nation's debt to our veterans, their dependents and survivors is rooted in the simple fact that our nation as we know it would not exist but for their efforts in defending and standing ready to defend our way of life. The precise nature and extent of the Government's obligations to our veterans at any given time are defined by the American people through their Congress, but the American commitment to the concept of gratitude for service predates even the founding of the Republic. When Abraham Lincoln spoke in his Second Inaugural Address of his desire "to care for him who shall have borne the battle and for his widow and his orphan," he was furthering a tradition already ingrained in the values of America for over two centuries. A recent discussion prepared by the Board of Veterans Appeals on the historical background of veterans benefits noted that in 1636, the Plymouth Colony settlers, following a tradition brought from England, passed a law providing that a disabled soldier "shalbee maintained competently by the Collonie during his life." This tradition of debt and gratitude to those whose efforts preserved our freedoms and our way of life continues today and we have the duty of passing it on to future generations.

Question 2.: Please describe the aspects of your record in the Department of Justice, other Federal service, and other employment or experiences that would lead a veteran or veteran's dependent or survivor seeking assistance from the Federal Government to believe that you would give his or her case sympathetic consideration.

Response to Question 2.: As a judge-designate, it would, of course, be inappropriate for me to "convey or permit others to convey the impression that they are in a special position to influence [me]." (Code of Judicial Conduct for United States Judges at Canon 2.) I would approach every case with an open mind without a prejudgment resulting from either antagonism or sympathy toward any party or claim.

With regard to my record, I am a veteran, a disabled veteran. I entered the Army as a private E-1 in June, 1966, and retired in April, 1970, as a captain. I went through basic training, advanced artillery training and Officer Candidate School. After one year at Fort Meade, Maryland, I joined the 25th Infantry Division in Vietnam and spent ten months in the field as a forward observer and battery executive officer. Like thousands

of veterans, I have seen combat; I received four Bronze Star Medals, two Purple Heart Medals and the Army Commendation Medal. Like thousands of veterans, I was wounded; I spent fourteen months in Walter Reed Army Medical Center before I retired due to disability. Like thousands of veterans, I took advantage of veterans benefits; I attended Hofstra University School of Law where I was Editor-in-Chief of the Hofstra Law Review and graduated first in my class. I joined the Department of Justice in 1973 and I have worked since then on tort cases arising from the entire spectrum of governmental activity. Where there was no basis in fact or in law for a recovery, I worked hard in defense of the interests of the United States; on the other hand, when there was justification for compensation, I have endeavored to insure that injured plaintiff was treated fairly in the firm belief that the government, perhaps more so than other litigants, has a duty and a responsibility to compensate those injured by the acts of its employees. Finally, I believe that I have developed a particular sensitivity to the needs of individuals in difficult situations from my representation of and addresses to literally thousands of federal public servants.

Respectfully submitted,

John J. Farley, III